Telegraph Acts have been incorporated in the text; as also the provisions of the following English Statutes, viz:—The Territorial Waters Jurisdiction Act; The Act for punishing offences against the Slave Trade Act, committed in certain places in Asia and Africa (which are also printed at length in the Appendix), and the Order in Council issued under the latter; and the Courts (Colonial) Jurisdiction Act, which over-rules the cases of *Reg.* v. *Thompson* in Calcutta and *Reg.* v. *Elmstone* in Bombay so far as they relate to the law under which offences committed within the Admiralty jurisdiction are to be punished. The law on this point as laid down in the former Edition of this work has been approved of by the High Court at Bombay in the case of *Emp.* v. *Shaik Abdul Rahiman*, cited at p. 17.

In the Appendix will also be found so much of the Zanzibar Order in Council, 1884, as relates to criminal matters, and the Zanzibar Order in Council, 1889.

In order that this work may be used more conveniently in Ceylon, a table has been prefixed, showing the sections of the Indian Penal Code which correspond to those of the Ceylon Code.

In conclusion, I have only to add that the text of the present Edition has been carefully revised and in many cases re-arranged and re-written.

M. H. STARLING.

HIGH COURT, BOMBAY,
January 1890.

CONTENTS.

THE INDIAN PENAL CODE, &c.

TABLE OF ACTS, STATUTES AND ORDERS IN COUNCIL IN THE APPENDIX.

EXPLANATION OF ABBREVIATIONS.

A. & E. .....Adolphus and Ellis' Reports.
Add. .....Addam's Ecclesiastical Reports.
B. & Ad. .....Barnewall and Adolphus' Reports.
B. & Ald.....Barnewall and Alderson's Reports.
B. & C.....Barnewall and Cresswell's Reports.
B. & S. .....Best and Smith's Queen's Bench Reports.
B. Moo. .....J. B. Moore's Reports, C. P.
B. R. .....Unreported Rulings of the Bombay High Court.
Bar. K. B.....Barnadiston's Reports, K. B.
Beav. .....Beavan's Reports.
Bell, C. C.....Bell's Crown Cases.
Bos. & P. .....Bosanquet and Puilen's Reports.
Burr. ..... Burrow's Reports, K. B.
C. & K. .....Carrington and Kirwan's Nisi Prius Reports.
C. & Mar. or Car. & M. ...Carrington and Marsden's Nisi Prius Reports.
C. & P. ..... Carrington and Payne's Nisi Prius Reports.
C. B. .....Common Bench Reports.
C. B. N. S. ... Do. do. New Series.
Camp. ..... Campbell's Reports.
Car. Sup.....Carrington's Supplement of Treatises on Criminal Law.
Co. .....Lord Coke's Reports.
Cox C. C. or C. C. C.....Cox's Criminal Cases.

C. P. D. .....Common Pleas Division Reports.
Cro. Car. .....Croke's Reports, temp. Charles I.
Curt. .....Curtis' Ecclesiastical Reports.
Deane.....Deane's Ecclesiastical Reports.
Dears. C. C. ..Dearsley's Crown Cases.
Dears & B. ..Dearsley and Bell's Crown Cases.
DeG. M. & G...DeGex MacNaghten and Gordon's Reports.
Den. C. C.....Denison's Crown Cases.
Doug. .....Douglas' Reports, K. B.
Dow. P. C.....Dowling's Practice Cases.
East P. C. .....East's Pleas of the Crown.
El. & Bl. .....Ellis and Blackburn's Reports.
Esp. .....Espinasse's Reports.
Ex. D. .....Exchequer Division Reports.
F. & F.....Foster and Finlayson's Nisi Prius Reports.
Fost or Fost. Cr. L. } Foster's Crown Law.
Hagg. .....Haggard's Ecclesiastical Reports.
Hagg. Con. ...Haggard's Consistory Reports.
H. & C. .....Hurlstone and Coltman's Reports.
Hawk .....Hawkins' Pleas of the Crown.
Jur. .....Jurist.
" N. S. ..... " New Series.
Kel.....Kelynge's Reports, K. B.
L. & C. .....Leigh and Cave's Reports.
L. T. .....Law Times Reports.
L. T. N. S..... do. do. New Series.
Ld. Raym.....Lord Raymond's Reports.
Lea.....Leach's Crown Cases Reserved.
Lev.....Levinz's Reports.
Lewin C. C. ...Lewin's Crown Cases on the Northern Circuit.
L. J. N. S. C. P. Law Journal Reports, New Series, Common Pleas.
Ex. do. do. Exchequer.
M. C. do. do. Magistrates' Cases.
P. & M. do. do. Probate and Matrimonial.
Q. B. do. do. Queen's Bench.
Lofft .....Lofft's Reports, K. B.
L. R. C. C.....Law Reports, Crown Cases.
C. P. ... do. do. Common Pleas.
Ex. ..... do. do. Exchequer.
P. C. ... do. do. Privy Council.
Q. B. ... do. do. Queen's Bench.
M. Dig. .....Morley's Digest.
M. & R.....Moody and Robinson's Reports.
Macq. H. L. Ca. Macqueen's House of Lords' Cases.
Mod. .....Modern Reports.
Moo. & M. ....Moody and Malkin's Nisi Prius Reports.
Mood. C. C. ...Moody's Crown Cases.
Moore I. A. .. Moore's Indian Appeals.
M. & Sel. .....Manle and Selwyn's Reports.
M. & W. .....Meeson and Welsby's Reports.
N. R. ..... New Reports.
Q. B. .....Queen's Bench Reports.
Q. B. D.....Queen's Bench Division Reports.
R. C. C. Cr. ...Revenue, Civil and Criminal Reporter (Calcutta) Criminal Rulings.
R. J. & P. .....Revenue, Judicial and Police Journal (Calcutta).
R. & R. .....Russell and Ryan's Nisi Prius Reports.
Robert .....Robert's Ecclesiastical Reports.
Rol. Rep. .....Rolle's Reports, King's Bench.
Russ. .....Russell on Crimes.
Ry. & Moo. N. P. C. Ryan and Moody's Nisi Prius Reports.
Salk.....Salkeld's Reports.
Sim. .....Simon's Reports.
Smale & G.....Smale and Giffard's Reports.
Str. .....Strange's Reports in the Queen's Bench.
T. R. .....Term Reports.
T. Raym. .....Thos. Raymond's Reports.
W. Bl. .....Sir Wm. Blackstone's Reports.
Wood. C. C. ...Wood's Crown Cases.
W. R. .....English Weekly Reporter.
W. R. Cr. .....Calcutta Weekly Reporter, Criminal Rulings.

TABLE OF CASES.

Note.—Where a numeral is followed by the syllable *add*, the case to which it is affixed will be found among the Addenda, the numeral representing the page of the book at which it ought to be inserted.

COMPARATIVE STATEMENT.

TABLE showing the correspondence of the sections of the Ceylon Penal Code, with those of the Indian Penal Code and the pages of this work at which the latter are to be found.

Ceylon Code.	Indian Code.	Page
Section 1	...	...
2	2	2
3	...	...
4	5	6
5	6	22
6	7	,,
7	8	,,
8	9	23
9	10	,,
10	11	,,
11	12	,,
12	13	,,
13	14	,,
14	17	24
15	...	...
16	...	...
17	19	24
18	20	25
19	21	,,
20	22	28
21	23	,,
22	24	,,
23	25	29
24	26	30
25	27	,,
26	28	,,
27	29	31
28	30	32
29	31	33
30	32	,,
31	33	,,
32	34	,,
33	35	,,
34	36	,,
35	37	34
36	38	35
37	39	,,
38	40	,,
39	41	36
40	42	,,
41, 42	43	,,
43	44	37
44	45	,,
45	46	,,
Section 46	17	37
47	48	,,
48	49	,,
49	50	,,
50	51	,,
51	52	,,
52	53	39
53	60	43
54	61	,,
55	...	...
56	...	...
57	...	...
58	...	...
59	63	44
60	64	45
61	65	,,
62	66	46
63	67	,,
64	68	,,
65	69	47
66	70	48
67	71	,,
68	75	53
69	76	57
70	77	,,
71	78	,,
72	79	58
73	80	67
74	81	69
75	82	74
76	83	75
77	84	77
78	85	83
79	86	,,
80	87	85
81	88	87
82	89	88
83	90	92
84	91	94
85	92	95
86	93	96
87	94	,,
88	95	97
89	96	98
90	97	,,

Ceylon Code.		Indian Code.		Page
Section	91 ...	98 ...		98
	92 ...	99 ...		99
	93 ...	100 ...		100
	94 ...	101 ...		101
	95 ...	102 ...		„
	96 ...	103 ...		„
	97 ...	104 ...		102
	98 ...	105 ...		„
	99 ...	106 ...		108
	100 ...	107 ...		109
	101 ...	108 ...		„
	102 ...	109 ...		120
	103 ...	110 ...		121
	104 ...	111 ...		122
	105 ...	112 ...		128
	106 ...	113 ...		„
	107 ...	114 ...		124
	108 ...	115 ...		125
	109 ...	116 ...		126
	110 ...	117 ...		128
	111 ...	118 ...		129
	112 ...	119 ...		„
	113 ...	120 ...		130
	114 ...	121 ...		132
	115 ...	121A ...		„
	116 ...	122 ...		136
	117 ...	123 ...		137
	118 ...	... ...		...
	119 ...	124 ...		138
	120 ...	124A...		139
	121 ...	125 ...		133
	122 ...	126 ...		140
	123 ...	127 ...		141
	124 ...	128 ...		142
	125 ...	129 ...		„
	126 ...	130 ...		143
	127 ...	... ...		...
	128 ...	131 ...		145
	129 ...	132 ...		„
	130 ...	133 ...		„
	131 ...	134 ...		„
	132 ...	135 ...		146
	133 ...	136 ...		„
	134 ...	137 ...		„
	135 ...	138 ...		„
	136 ...	139 ...		147
	137 ...	140 ...		148
	138 ...	141 ...		150
	139 ...	142 ...		„
	140 ...	143 ...		151

Ceylon Code.		Indian Code.		Page
Section	141 ...	144 ...		151
	142 ...	145 ...		„
	143 ...	143 ...		155
	144 ...	147 ...		„
	145 ...	148 ...		„
	146 ...	149 ...		„
	147 ...	150 ...		160
	148 ...	151 ...		163
	149 ...	152 ...		164
	150 ...	153 ...		165
	151 ...	154 ...		167
	152 ...	155 ...		„
	153 ...	153 ...		168
	154 ...	157 ...		170
	155 ...	158 ...		161
	156 ...	159 ...		171
	157 ...	160 ...		„
	158 ...	161 ...		173
	159 ...	162 ...		174
	160 ...	163 ...		175
	161 ...	164 ...		176
	162 ...	166 ...		180
	163 ...	167 ...		181
	164 ...	... ...		...
	165 ...	... ...		...
	166 ...	... ...		...
	167 ...	... ...		...
	168 ...	170 ...		183
	169 ...	171 ...		184
	170 ...	172 ...		185
	171 ...	173 ...		„
	172 ...	174 ...		186
	173 ...	175 ...		187
	174 ...	176 ...		193
	175 ...	177 ...		„
	176 ...	178 ...		198
	177 ...	179 ...		„
	178 ...	180 ...		„
	179 ...	181 ...		200
	180 ...	182 ...		201
	181 ...	183 ...		204
	182 ...	184 ...		„
	183 ...	186 ...		205
	184 ...	187 ...		„
	185 ...	188 ...		208
	186 ...	189 ...		213
	187 ...	190 ...		„
	188 ...	191 ...		214
	189 ...	192 ...		215
	190 ...	193 ...		216

Ceylon Code.		Indian Code.		Page
Section	191 ...	194 ...		217
	192 ...	195 ...		,,
	193 ...	196 ...		218
	194 ...	197 ...		,,
	195 ...	198 ...		,,
	196 ...	199 ...		219
	197 ...	200 ...		,,
	198 ...	201 ...		239
	199 ...	202 ...		242
	200 ...	203 ...		,,
	201 ...	204 ...		244
	202 ...	205 ...		245
	203 ...	206 ...		246
	204 ...	207 ...		247
	205 ...	208 ...		,,
	206 ...	209 ...		248
	207 ...	210 ...		,,
	208 ...	211 ...		250
	209 ...	212 ...		255
	210 ...	213 ...		260
	211 ...	214 ...		,,
	212 ...	215 ...		261
	213 ...	216 ...		256
	214 ...	217 ...		284
	215 ...	218 ...		,,
	216 ...	221 ...		267
	217 ...	222 ...		268
	218 ...	223 ...		239
	219 ...	224 ...		271
	220 ...	225 ...		272
	221 ...	225A(repealed)		
	222 ...	227 ...		276
	223 ...	228 ...		277
	224 ...	229 ...		279
	225 ...	230 ...		280
	226 ...	231 ...		,,
	227 ...	232 ...		281
	228 ...	233 ...		283
	229 ...	234 ...		283
	230 ...	235 ...		,,
	231 ...	236 ...		281
	232 ...	237 ...		285
	233 ...	238 ...		,,
	234 ...	239 ...		292
	235 ...	240 ...		,,
	236 ...	241 ...		293
	237 ...	242 ...		290
	238 ...	243 ...		,,
	239 ...	246 ...		288
	240 ...	247 ...		,,

Ceylon Code.		Indian Code.		Page
Section	241 ...	248 ...		289
	242 ...	249 ...		,,
	243 ...	250 ...		293
	244 ...	251 ...		294
	245 ...	252 ...		291
	246 ...	253 ...		,,
	247 ...	254 ...		294
	248 ...	255 ...		300
	249 ...	256 ...		,,
	250 ...	257 ...		301
	251 ...	258 ...		,,
	252 ...	259 ...		,,
	253 ...	260 ...		,,
	254 ...	261 ...		302
	255 ...	262 ...		,,
	256 ...	263 ...		,,
	257 ...	264 ...		304
	258 ...	265 ...		,,
	259 ...	266 ...		,,
	260 ...	267 ...		,,
	261 ...	268 ...		308
	262 ...	269 ...		314
	263 ...	270 ...		,,
	264 ...	271 ...		315
	265 ...	272 ...		316
	266 ...	273 ...		,,
	267 ...	274 ...		,,
	268 ...	275 ...		317
	269 ...	276 ...		,,
	270 ...	277 ...		319
	271 ...	278 ...		,,
	272 ...	279 ...		320
	273 ...	280 ...		,,
	274 ...	281 ...		322
	275 ...	282 ...		324
	276 ...	283 ...		322
	277 ...	284 ...		325
	278 ...	285 ...		,,
	279 ...	286 ...		,,
	280 ...	287 ...		326
	281 ...	288 ...		,,
	282 ...	289 ...		,,
	283 ...	290 ...		308
	284 ...	291 ...		329
	285 ...	292 ...		330
	286 ...	293 ...		,,
	287 ...	294 ...		331
	288 ...	294A ...		332
	289 ...	... ...		,,
	290 ...	295 ...		335

Ceylon Code.		Indian Code.		Page
Section	391 ..	408 ...		472
	392 ...	409 ...		473
	393 ...	410 ...		477
	394 ...	411 ...		478
	395 ...	413 ...		,,
	396 ...	414 ...		,,
	397 ...	... ...		...
	398 ...	415 ...		488
	399 ...	416 ...		490
	400 ...	417 ...		,,
	401 ...	418 ...		,,
	402 ...	419 ...		,,
	403 ...	420 ...		491
	404 ...	421 ...		500
	405 ...	422 ...		501
	406 ...	423 ...		,,
	407 ...	424 ...		,,
	408 ...	425 ...		504
	409 ...	426 ...		505
	410 ...	427 ...		,,
	411 ...	428 ...		506
	412 ...	429 ...		,,
	413 ...	430 ...		,,
	414 ...	431 ...		,,
	415 ...	432 ...		507
	416 ...	433 ...		,,
	417 ...	434 ...		,,
	418 ...	435 ...		,,
	419 ...	436 ...		508
	420 ...	437 ...		,,
	421 ...	438 ...		,,
	422 ...	439 ...		,,
	423 ...	... ...		...
	424 ...	... ...		...
	425 ...	... ...		...
	426 ...	440 ...		509
	427 ...	441 ...		514
	428 ...	442 ...		,,
	429 ...	443 ...		515
	430 ...	444 ...		,,
	431 ...	445 ...		,,
	432 ...	446 ...		517
	433 ...	447 ...		522
	434 ...	448 ...		523
	435 ...	449 ...		524
	436 ...	... ...		...
	437 ...	451 ...		524
	438 ...	452 ...		,,
	439 ...	453 ...		526
	440 ...	454 ...		,,

Ceylon Code.		Indian Code.		Page
Section	441 ...	455 ...		527
	442 ...	456 ...		528
	443 ...	457 ...		,,
	444 ...	458 ...		529
	445 ...	459 ...		530
	446 ...	460 ...		,,
	447 ...	461 ...		531
	448 ..	462 ...		532
	449 ...	... ...		...
	450 ...	... ...		...
	451 ...	... ...		...
	452 ...	463 ...		534
	453 ...	464 ...		,,
	454 ...	465 ...		538
	455 ...	466 ...		,,
	456 ...	467 ...		539
	457 ...	468 ...		,,
	458 ...	470 ...		552
	459 ...	471 ...		,,
	460 ...	472 ...		556
	461 ...	473 ...		,,
	462 ...	474 ...		557
	463 ...	475 ...		558
	464 ...	476 ...		,,
	465 ...	... ...		...
	466 ..	477 ...		559
	467 ...	478 ...		560
	468 ...	479 ...		,,
	469 ...	480 ...		,,
	470 ...	481 ...		,,
	471 ...	482 ...		561
	472 ...	483 ...		567
	473 ...	484 ...		,,
	474 ...	485 ...		568
	475 ...	486 ...		570
	476 ...	487 ...		571
	477 ...	488 ...		,,
	478 ...	489 ...		572
	479 ...	499 ...		621
	480 ...	500 ...		626
	481 ...	501 ...		,,
	482 ...	502 ...		,,
	483 ...	503 ...		645
	484 ...	504 ...		647
	485 ...	505 ...		648
	486 ...	506 ...		645
	487 ...	507 ...		646
	488 ...	510 ...		652
	489 ...	... ...		...
	490 ...	511 ...		654

ERRATA AND ADDENDA.

Page vix, line 19 from top
" 5 " 14 " bottom
" 10 " 17 " " } Garmukh Singh shou'd be Sarmukh Singh.

Page 10. After the words "determined in some future case" insert: "There is no question that the Indian Legislature cannot legislate for acts done on the high seas by persons other than Native Indian subjects, because none of the statutes quoted on pp. 6 and 7 authorise that Legislature to legislate for British subjects of Her Majesty in any other place than British India and the dominions of Princes and States in India in alliance with Her Majesty."

Sect. 25, p. 29. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly without caring whether it be true or false; *Derry* v. *Peek*, 14 App. Ca. 337.

Sect. 71, p. 51. Where an accused had committed the offence of rioting, and had also by his own hands caused grievous hurt, it was held that he was rightly convicted and sentenced separately for each of such offences; *Mohur Mir* v. *Emp. I. L. R.* 16. *Calc.* 725.

Sect. 188, p. 209. Where a magistrate makes a conditional order under Sect. 133 Cr. P. C., directing a person to do an act, and that person does not appear and shew cause against the order, or ask for the appointment of a jury to try whether the order is reasonable and proper, in consequence of which the order is made absolute, it is not competent for him when charged under Sect. 188, I. P. C., with disobedience of the final order, to go behind it and shew that the order ought never to have been made, because, the order having been *lawfully* made, the disobedience of that order constitutes the offence; *Emp.* v. *Narayana, I. L. R.* 12 *Mad.* 475.

Sect. 441, p. 519. During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to premises belonging to the defendant, in his absence, and without his permission for the purpose of making a survey and getting materials for a hostile application against him. Some of them were armed, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting: held that their action amounted to criminal trospass; *Golap Pandey* v *Bodjam, I. L. R.* 16 *Calc.* 715.

Page 496. If A advertises a book as written by B (a non-existent person) and gets subscriptions from the public in the form of money orders payable to B, and receives the amounts of such orders on a request purporting to be signed by B, A is guilty of cheating the Postmaster who pays him the money; *Emp.* v. *Pera Raju, I. L. R.* 13. *Mad.* 27.

Page 545 The signing of the name of a fictitious person is forgery, if the fictitious name be assumed for the purposes of fraud; *Emp.* v. *Pera Raju, I. L. R.* 13 *Mad.* 27.

Page 576-7. On the sale of goods by a manufacturer of such goods, *who is not otherwise a dealer in them*, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make; *Johnson* v. *Raylton*, 7 *Q. B. D.* 438.

Page 577. The respondents, who were manufacturers of gunpowder in England, entered into a contract with the English Government to supply powder. Owing to an accident they were unable to manufacture the powder themselves, and in order to carry out their contract they bought German powder, of a quality equal to that of their own manufacture, put it into barrels supplied by Government, and put labels upon the barrels containing their own name, and a description applicable to the powder of their own manufacture which they would have delivered if they had not been prevented by the accident, but without any indication that the powder was of German manufacture. Held, that the respondents were guilty of the offence of applying a false trade description to goods, and that they had acted with intent to defraud; *Starey* v. *The Chilworth Gunpowder Co.* 24 *Q. B. D.* 90.

Page 578. Fraud under the Merchandise Marks Act is not used in the sense of putting off a bad article on a customer as a good one, but the putting off on a purchaser of an article different from that which he intends to purchase, and believes that he is purchasing; *Starey* v. *The Chilworth Gunpowder Co.* 24 *Q. B. D.* 90.

INDIAN CRIMINAL LAW.

PENAL CODE.

(ACT XLV. OF 1860)

CHAPTER I.

EXTENT OF OPERATION OF PENAL CODE.

Sect. 1. *Title and Extent of Operation of Penal Code.*—**This Act shall be called the Indian Penal Code, and shall take effect on and from the 1st day of May 1861 throughout the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Vict. c. 106, entitled, "An Act for the better government of India," except the Settlement of Prince of Wales Island, Singapore, and Malacca.**

Notes.

This Act is now extended to the abovementioned Settlement by Act V. of 1867. Every part of the Code where the 1st day of May 1861 appears is to be construed as if the words "1st day of January 1862" had been used instead. Act VI. of 1861.

By 21 & 22 Vict. c. 106, s. 1, the territories to which this Act applies are defined to be all territories then in the possession or under the government of the East India Company and all territories which may become vested in Her Majesty by virtue of any rights vested in or which might, but for the passing of that Act, have been exercised by the said Company in relation to any territories.

Sect. 2. *Infringement of Provisions of Code.*—**Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories, on and after the said 1st day of May 1861.**

Notes.

The locality of the said territories extends to three miles from their shore; and up to the year 1878 an offence committed within three miles of such shore would have brought the offender under the provisions of the Indian Penal Code; *Reg.* v. *Irvine, 1st March, Sess.* 1867; *Reg.* v. *Elmstone*, 7 *Bom. H. C. Rep. C. C.* 104; *Reg.* v. *Kastya Rama*, 8 *Bom. H. C. Rep. C. C.* 67; see also *Rolet* v. *The Queen. L. R., I. P. C.* 198. This jurisdiction under the Code over such part of the sea did not oust the Admiralty jurisdiction; *Reg.* v. *Elmstone, ubi supra; Reg.* v. *Pauline*, 9 *Jur. N. S.* 286. The limit of three miles appears to have been fixed as being the limit of the range of a cannon shot fired to sea from low-water mark, the rule being, *potestatem terræ finiri ubi finitur armorum vis* (Bynkershoek, *De Dominio maris*, cap. 2).

In 1876, one Keyn, who was a foreigner in command of a foreign ship, whilst passing within three miles of the shore of England, on a voyage to a foreign port, ran into a British ship and sank her, thereby causing a passenger to be drowned, under such circumstances as would amount to manslaughter by English law; and it was held that the English Courts had no jurisdiction to try him; *Reg.* v. *Keyn*, 2 *Ex. D.* 63; see also *Harris* v. *Franconia*, 2 *C. P. D.* 171. Consequently from 1876 to 1878, the law was that the three miles limit only applied to cases where an offence was committed within those limits by a British subject. Two years later this ruling of the Court for Crown cases reserved was set aside by the *Territorial Waters Jurisdiction Act*, 1878, 41 and 42 Vict. c. 73, which came into force on the 16th August 1878, Sect. 2 of which provides that, "*an offence committed by a person, whether he is or is not a subject of Her Majesty on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on*

board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly;" but no person, who is not a subject of Her Majesty, can be tried and punished under this Act, except with the consent, in the United Kingdom, of one of the Secretaries of State, and out of the United Kingdom, of the Governor of the place where the proceedings are to be instituted, Sect. 3; although the preliminary enquiry can be held without such consent, Sect. 4; and the word "offence" in this Act means an act, neglect or default of such a description as would, if committed within the body of a county in England, be punishable, on indictment, according to the law of England for the time being in force, Sect. 7. Sect. 7 also defines the expression "open sea within the territorial waters of Her Majesty's dominions" as being "*any part of the open sea within one marine league of the coast measured from low-water mark.*"

A very important question therefore arises whether an offence committed on the open sea within three miles from low-water mark is now an offence committed within the Admiralty jurisdiction and therefore to be dealt with in the manner proper to such offences, or whether it can be dealt with *directly* under the Penal Code. Any act, &c., punishable under the Penal Code, which would not, if committed in England, amount to an *indictable* offence, would not be affected by this Act, but the offences under the Penal Code, which are most likely to be committed within these limits, viz., murder, culpable homicide not amounting to murder, theft, criminal breach of trust, hurt and riot, are indictable offences in England, and would therefore have to be dealt with as Admiralty offences; all those offences which are not indictable in England would have to be dealt with under the Penal Code, as laid down in *Reg.* v. *Kastya Rama*, 8 *Bom. H. C. Rep. C. C.* 67; but there would be no jurisdiction to try an accused, who was not a British subject, *under the provisions of this Act* for such an offence committed on board a foreign ship; *Reg.* v. *Keyn*, 2 *Ex. D.* 63. The mode of dealing with Admiralty offences will be discussed under the heading of Admiralty Jurisdiction.

The whole of the acts which are necessary to constitute the alleged offence must have happened in British India; *Emp.* v. *Moorgy Chetty*, *I. L. R.* 5 *Bom.* 338 overruling *Reg.* v. *Lakhya*

Govind, I. L. R. 1 *Bom.* 50, and disapproving of *Emp.* v. *Sunker Gope, I. L. R.* 6 *Calc.* 307; *Reg.* v. *Carr*, 10 *Q. B. D.* 76; and *Bapu Daldi* v. *The Queen, I. L. R.* 5 *Mad.* 23; unless the Legislature makes provision to the contrary, as is done by Sects. 3 and 4 of the Penal Code; by the statutes which regulate the punishment of offences committed at sea; by Act VIII. of 1882, Sect. 9, in respect of property stolen outside the jurisdiction of the Indian Courts, and received or retained within their jurisdiction; by the Crim. P. C. 1882, *Sect.* 188, in respect of offences committed by European British subjects in the dominions of a Prince or State in India in alliance with Her Majesty, or by Native Indian subjects of Her Majesty at any place outside British India. The offence, also, should be begun and completed within the local limits of the Court by which it is to be enquired into and tried; *Crim. P. C. Sect.* 177; except in the cases provided for in Chap. XV. of that Code, of which Sect. 177 forms a part, where the offence is partly committed within the jurisdiction and partly without.

Sect. 3. *Offences committed beyond the Limits of the said Territories.*—**Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories, in the same manner as if such act had been committed within the said territories.**

Sect. 4. *Offences committed by a Servant of the Queen within a Foreign Allied State.*—**Every servant of the Queen shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof of which he, whilst in such service, shall be guilty on or after the said 1st day of May 1861 (1st day of January 1862), within the dominions of any Prince or State in alliance with the Queen, by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India.**

Notes.

Act I. of 1849, repealed by Act XI. of 1872, gave jurisdiction to the Indian Courts over all subjects of the British Government and all persons, in civil and military service of the same Government, while actually in such service, and for six months afterwards, and *all persons who may have dwelt for six months* within the British Indian territories in respect of all offences committed by them within the territory of *any foreign Prince or State*, provided they were found within British Indian territory after the commission of such offence. Consequently, a foreigner who had dwelt for six months in British India and subsequently committed a murder at Pekin might have been tried in British India, if subsequently to the murder he had been found there. Such is not however the case now. The only persons now triable in British India under *any law passed by the Governor-General in Council* for offences committed outside British India, are those mentioned in Sects. 3 and 4 of the Penal Code, and under the provisions of the *Criminal Procedure Code*, Sect. 188, European British subjects in respect of offences committed in the territories of any Prince or State *in India* in alliance with the Queen; and Native Indian subjects of the Queen in respect of offences committed *anywhere* beyond the limits of British India. Under this section a Native Indian subject of Her Majesty who commits an offence in Cyprus, can be tried for it in British India; *Emp.* v. *Garmukh Singh*, *I.L.R.* 2 *All.* 218. a case which was decided under the Foreign Jurisdiction Act of 1872 Sects. 8 and 9, the latter of which is identical in terms with Sect. 188 of the Criminal Procedure Code. Consequently a Native Indian subject might commit adultery in England, where it is no offence, and yet be charged by the injured husband and punished for that offence in Bombay, if found there, because he is liable for the offence *as if he had committed it in the place* in British India *where he is found.*

British subjects on a voyage from Bhavnagar to Bombay committed criminal breach of trust in respect of goods entrusted to them by selling them *en route* at Damaun, a Portuguese settlement, and having then absconded, they were subsequently found in British Territory; and it was held that they could be tried there

for the offence they had committed; *Emp.* v. *Daya Bhima, I. L. R.* 13 *Bomb.* 147; following *Emp.* v. *Mayanlal, I. L. R.* 6 *Bomb.* 622. The proviso to Sect. 189, Cr. P. C. has no application to a place where there is no Political Agent; *Emp.* v. *Daya Bhima, ubi supra.*

The orders of the Governor-General in Council, declaring over what foreign Indian territories the various High Courts have respectively jurisdiction in respect of offences committed by European British subjects, will be found in Agnew and Henderson's Code of Criminal Procedure in the Notes to Sect. 458.

Sect. 5. *Certain Acts not to be repealed.*—**Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 & 4 Will. 4. c. 85, or of any Act of Parliament passed after that statute in anywise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers and soldiers in the service of Her Majesty or of the East India Company, or of any Act for the government of the Indian Navy, or of any special or local law.**

Offences on the High Seas.

The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas was considered at great length in the case of *Reg.* v. *Elmstone,* 7 *Bom. H. C. Rep. C. C.* 89, by *Westropp,* C. J., at p. 100.

The legislative authority of the Governor in Council was created by Act 3 & 4 Will. 4. c. 85; Sect. 43, which is to the following effect:—*The said Governor in Council shall have power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the said territories, on any part thereof, and to make laws and regulations for all persons, whether British or Native, foreigners or others, and for all courts of justice, whether established by His Majesty's charters or otherwise, and the jurisdictions thereof,*

and for all places and things whatsoever within and throughout the whole and every part of the said territories, and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company; save and except that the said Governor-General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of this Act, or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company, or any provisions of any Act hereafter to be passed in anywise affecting the said Company or the said territories or the inhabitants thereof, or any laws or regulations which shall in any way affect any prerogative of the Crown or the authority of Parliament, or the constitution or rights of the said Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." By Act 24 & 25 Vict. c. 67 (The Indian Councils Act), s. 22, the Governor-General in Council, as by the statute constituted, was enabled to make laws and regulations for "*all persons, whether British or Native, foreigners or others, and for all courts of justice whatever and for all places and things whatever within the said territories* (of India,) *and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty.*" With the proviso, however, that this Indian Legislature should not have the power of legislating so as to repeal or in any way affect certain imperial statutes therein named, "*or any provisions of any Act passed in this present session of Parliament* (1861), *or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof, or which may affect the authority of Parliament.*" The special power in the above Acts to legislate for all servants of the Government within the dominions of Princes and States in alliance with the Company or Her Majesty was extended, by Act 28 & 29 Vict. c. 17, to "*all British subjects of Her Majesty within the dominions of Princes or States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise.*" By Act 32 & 33 Vict. c. 98 the Governor-General in Council was empowered to make laws and regulations

for all Native Indian subjects of Her Majesty, her heirs and successors, without and beyond, as well as within the Indian territories under the dominion of Her Majesty; and by Sect. 2 of the same Act it was provided that "*no law heretofore passed by the Governor-General of India, or by the Governors of Madras and Bombay respectively, in Council, shall be deemed to be invalid solely by reason of its having reference to Native subjects of Her Majesty not within the Indian territories under the dominion of Her Majesty.*" This last Act was passed on account of a doubt raised by the law officers of the Crown whether Act I. of 1849 was valid, the Act giving jurisdiction over *all* British subjects in foreign States, and the law officers of the Crown being of opinion, in 1866, that in the case of offences committed in foreign States by Native Indian subjects of the Crown, the Governor-General in Council had not the power to make laws for their apprehension and punishment in British India, his power being restricted by Statutes 24 & 25 Vict. c. 67, s. 22, and 28 & 29 Vict. c. 17; *Forsyth's Collection of Cases and Opinions on Constitutional Law, p.* 24.

In *Reg.* v. *Ahu Paru, Perry's O. Ca.* 551, Sir *Erskine Perry*, referring to Sect. 43 of 3 & 4 Will. 4. c. 85, and to the words in it "within and throughout the whole and every part of the said territories," said:—"It is contended that these latter words apply to the persons who are to be legislated for, as well as to the places and things with which they are immediately collected. But the express distinction, which is made in the Act, between persons and things, lies deeply seated, I apprehend, in the principles of legislation, and corresponds with the distinction well known to jurists between personal and real statutes." And in this case Sir *Erskine Perry* expressed it as his opinion that 3 & 4 Will. 4 c. 85 had conferred power on the Indian Legislature to legislate for the high seas. With the reasons assigned in support of this opinion, the court, in the case of *Reg.* v. *Elmstone* (cited before), expressed itself dissatisfied. In this case Sir *Michael Westropp* in delivering judgment said (p. 107):—"The power given both in that Statute (24 & 25 Vict. c. 67, s. 22) and in the earlier Statute (3 & 4 Will. 4 c. 85 s. 43), to legislate, not only for all persons, British and Native, but also for foreigners, perhaps furnishes an argument in favour of the construction which applies the words

'within and throughout the whole and every part of the said territories' in the one statute, and 'within the said territories' in the other as well to 'persons' as to 'places and things,' as it is scarcely to be supposed that a general power to legislate for foreigners beyond those territories was intended; and if the word, 'foreigners' be limited to persons within the territories, so must the words 'all persons, British or Native.' It may be said that the intention was to give power to legislate for foreigners beyond the territories so far as international law would permit— *e.g.*, for foreigners on board British registered or Anglo-Indian registered ships. It is, however, difficult to understand why the Imperial Legislature should delegate to the Indian Legislature, or to any other provincial legislature, the power to legislate *generally*, either for British subjects or foreigners in British registered ships on the high seas. Were it to do so British subjects and foreigners in British ships might be subjected to conflicting laws in respect of their conduct on the high seas. Yet if the construction of the Statute 3 & 4 Will. 4 c. 85, s. 43, which Sir *E. Perry* put forward in *Reg.* v. *Alu Paru*, be correct, it would seem to involve such a power. It is not improbable that had the Imperial Legislature intended to confer any power upon the Indian Legislature to legislate for the high seas beyond the maritime territory of British India, that power would have been limited to Natives of India or persons domiciled in India, and perhaps to British subjects and foreigners in ships belonging to or registered in India. No such distinction is taken in the statutes. Nothing whatever is said as to the high seas, but words are introduced which, consistently with good grammar and the probable intention of Parliament, may be applied so as to limit the general power of legislation to the territory constituting British India. . . . The power to legislate for all servants of the Company in one statute, and for all servants of the Government of India in the other statute, respectively within the dominions of Princes and States in alliance with the Company or Her Majesty, is special and exceptional, and furnishes a very strong reason for supposing that the previous general power of legislation conferred by the same statutes is limited to the territories of British India." And *West*, J., in *Reg.* v. *Kastya Rama*, 8 *Bom.*

for all Native Indian subjects of Her Majesty, her heirs and successors, without and beyond, as well as within the Indian territories under the dominion of Her Majesty; and by Sect. 2 of the same Act it was provided that "*no law heretofore passed by the Governor-General of India, or by the Governors of Madras and Bombay respectively, in Council, shall be deemed to be invalid solely by reason of its having reference to Native subjects of Her Majesty not within the Indian territories under the dominion of Her Majesty.*" This last Act was passed on account of a doubt raised by the law officers of the Crown whether Act I. of 1849 was valid, the Act giving jurisdiction over *all* British subjects in foreign States, and the law officers of the Crown being of opinion, in 1866, that in the case of offences committed in foreign States by Native Indian subjects of the Crown, the Governor-General in Council had not the power to make laws for their apprehension and punishment in British India, his power being restricted by Statutes 24 & 25 Vict. c. 67, s. 22, and 28 & 29 Vict. c. 17; *Forsyth's Collection of Cases and Opinions on Constitutional Law, p.* 24.

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H. C. R. C. C. 63, said:—"It seems impossible to maintain that a general power of legislation for the high seas, where a subordinate Government can neither enforce obedience nor afford protection, is implied in the delegation to it of authority to make laws for the territory placed under it."

Thus it would appear, for the reasons set forth above, that the Indian Legislature has had no power conferred on it to legislate for offences committed on the high seas, even by British subjects, and the only authority which can apply the provisions of the Penal Code to such offences is the British Parliament. The Government of India have attempted to legislate for offences committed on the high seas in Act XXXI. of 1838, but as this Act has been so far as it affects offences on the high seas, repealed by Act VIII. of 1868, no question arises now on its interpretation. This was the only Act by which the Government of India had attempted to legislate for offences committed on the high seas until the passing of the Criminal Procedure Code, Sect. 188, which, by using the expression "any place out of British India" contains words wide enough to include the high seas, and it has, in the case of *Emp.* v. *Garmukh Singh*, *I. L. R.* 2 *All.* 218, been held that those words cover an offence committed in Cyprus, but whether the Indian legislature had power to include the high seas in those words, or did as a matter of fact intend so to include them, remains to be determined in some future case.

Admiralty Jurisdiction of the High Courts.

The present High Courts of Calcutta, Madras, and Bombay have the same Admiralty jurisdiction as that of the late Supreme Courts (see Charters, 1862, 1865, ss. 32, 33). The jurisdiction of the late Supreme Courts was that of the High Court of Admiralty in England as it stood on the 8th Dec. 1823, the date of the Letters Patent creating the Supreme Courts. The jurisdiction of the Supreme Court in Vice-Admiralty was created by commission from the High Court of Admiralty in England in 1843. The jurisdiction thus given in Vice-Admiralty was the jurisdiction possessed by the English High Court of Admiralty before the passing of Statute 3 & 4 Vict. c. 65, which enlarged the Admiralty jurisdic-

tion of the English High Court of Admiralty. See *Bee Lot* v. *The Augusta*, 10 *Bom. H. C. R.* 116; *in re The Asee*, 5 *Bom. H. C. R.* 68, 69, where it was held that the Statutes 3 & 4 Vict. c. 65, and 24 Vict c. 10, do not extend to India.

The offences which come within the Admiralty jurisdiction are thus defined by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 267:—

"*All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who, at the time when the offence is committed, is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England, and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England*"

Sect. 268 of the same Act provides where such offences may be tried in the following terms:—

"(1) *Whenever any complaint is made to any British consular officer of any of the offences mentioned in the last preceding section, or of any offence on the high seas having been committed by any master, seaman, or apprentice belonging to any British ship, such consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under necessary restraint, and of sending him as soon as practicable in safe custody to the United Kingdom, or to any British possession in which there is a court capable of taking cognisance of the offence, in any ship belonging to Her Majesty, or to any of her subjects, to be there proceeded against according to law:*

"(2) *For the purpose aforesaid such consular officer may order the master of any ship belonging to any subject of Her Majesty bound to the United Kingdom, or to such British possession as aforesaid, to receive and afford a passage and subsistence during the voyage to any*

such offender as aforesaid, and to the witnesses, so that such master be not required to receive more than one offender for every 100 *tons of his ship's registered tonnage, or more than one witness for every* 50 *tons of such tonnage; and such consular officer shall endorse upon the agreement of the ship such particulars with respect to any offenders or witnesses sent in her as the Board of Trade requires:*

"(3) *Every such master shall, on his ship's arrival in the United Kingdom, or in such British possession as aforesaid, give every offender so committed to his charge into the custody of some police officer or constable, who shall take the offender before a justice of the peace, or other magistrate by law empowered to deal with the matter, as in cases, of offences committed upon the high seas.*" And the section in conclusion provides, "*that every such master not complying when required with the above provisions shall incur for each offence a penalty not exceeding £50; and that the expenses of imprisoning any offender under Sect.* 267, *and of conveying him and the witnesses to the United Kingdom, or to such British possession as aforesaid, in any manner other than in the ship to which they respectively belong, shall be part of the costs of the prosecution, or be paid as costs on account of seafaring subjects of Her Majesty left in distress in foreign parts*" (see Sects. 211-213).

By Sect. 2 of the same Act, "Her Majesty's dominions" are defined as "*Her Majesty's dominions strictly so called, and all territories under the government of the East India Company, and all other territories (if any) governed by any charter or licence from the Crown or Parliament of the United Kingdom.*" "British possessions" are defined as "*any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom.*"

Sect. 267 of the above statute applies only to masters, seamen, and apprentices, but by Act 18 & 19 Vict. c. 91 (which, by Sect. 1, was directed to be taken as part of the above Act, and construed accordingly), s. 21, it is provided that:—"*If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the*

high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions, which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case, as if such crime or offence had been committed within such limits; Provided that nothing contained in this section shall be construed to alter or interfere with the Act 12 & 13 Vict. c. 96."

By Act 30 & 31 Vict. c. 124 (which, by Sect. 1, is to be construed with and as part of 17 & 18 Vict. c. 104), a further advance was made. Sect. 11 provides that:—"*If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's dominions which would have had cognisance of such crime or offence, if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid.*"

Law and Procedure Applicable to Offences On the High Seas.

In the case of *Reg.* v. *Thompson*, 1 *B. L. R. Cr.* 1, decided in 1867 before the passing of the Act 30 & 31 Vict. c. 124, the prisoner was charged, under 7 Will. 4 & 1 Vict. c. 85, s. 2, with a criminal offence on board a British ship upon the high seas and within the Admiralty jurisdiction of the Calcutta High Court, and was found guilty by a jury of an offence under Statute 14 & 15 Vict. c. 19, s. 5. The Court held that the Procedure adopted was properly the Indian procedure; followed on this point in *Emp.* v. *Barton*, *I. L. R.* 16 *Calc.* 238; but that the charge and conviction were properly founded on the English statutes, and that the punishment must be according to English law. *Peacock*, C. J., in this case, referring to Statute 12 & 13 Vict. c. 96, said:—"I can well understand that Parliament would prefer to make such persons subject to the punishment imposed by English law, rather than that of the colony; they might not be certain what that law was, or, if aware of it, might not wish to extend it." In the case of

Reg. v. *Elmstone*, 7 *Bom. H. C. Rep. C. C.* 89, it was held that the substantive law applicable to a British born subject tried in the High Court at Bombay for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, was the English law, and not the Indian Penal Code and the procedure applicable, the ordinary criminal procedure of the High Court. In this case it was contended by counsel for the prisoner that the words "the Court shall have jurisdiction to hear *and determine* the case as if the offence had been committed within their local limits," in Act 30 & 31 Vict. c. 124, s. 11, (not in operation when *Reg.* v. *Thompson* was decided,) had the effect, that the offence in question, committed on the high seas, must be tried and *punished* as if committed in India. But the Court, citing Sect. 267 of the Merchant Shipping Act, 17 & 18 Vict. c. 104; and Sect. 2 of the Statute 12 and 13 Vict. c. 96 as showing conclusively that the law of punishment prescribed by those statutes is the law of England, and Sect. 1 of 30 & 31 Vict. c. 124 which provides that "this Act shall be construed with and as part of the Merchant Shipping Act"—held that the words cited by counsel could not have the effect contended for by them. In all criminal cases, then, tried in India, whether in the Mofussil or High Courts, under their Admiralty jurisdiction, it would appear that the procedure applicable is the ordinary criminal procedure of the court trying the case; but the substantive law applicable, at any rate up to the passing of the statute about to be mentioned, was English law and not that of the Penal Code.

Subsequently to the decision in *Reg.* v. *Elmstone*, the Imperial Legislature passed the 37 & 38 Vict. c. 27, which applies to India, by the third section of which it is enacted that, "*when, by virtue of any Act of Parliament, now* or hereafter to be *passed, a person is tried in a court of any colony*" (which term includes British India) "*for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony, and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of*

the local jurisdiction of such court, and to no other, *anything in any Act to the contrary notwithstanding. Provided always that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the persons shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.*"

What then is the effect of this statute? At the time of the decision of the case of *Reg.* v. *Elmstone*, it was held that none of the English Acts permitted an accused to be punished under any but English law; consequently, the charges must be drawn under the English statutes and not under the Penal Code. The present statute specifically provides that the punishment for the "crimes and offences" therein described shall be the same as is allotted to the same "crimes and offences" within the jurisdiction of the court trying the case. What then is the meaning of the term "crimes and offences?" It cannot mean the technical names by which crimes are known in England, otherwise the statute would be of scarcely any force at all, as it would then apply only to such colonies as described crimes by exactly the same terms as are used in England, but it must mean the acts, neglects and defaults which go to make up and constitute the crime or offence, and then the meaning of the Act would be that if a person is charged in a colony with having committed any act, default, or omission which would amount to a crime or offence under English law, then, on conviction, such person would be liable to be punished as if such act, neglect, or default had occurred within the local jurisdiction of the Colonial Court. Thus having, prior to this statute, had local procedure applicable, we, by this statute, have local punishment applied, and in India such punishment would be under the Penal Code; and since a law is a command to the breach of which a sanction or punishment is attached, it would appear that the law under which a person is to be punished must be the substantive law applicable to the case, because it is the law which points out the breach to which the punishment is attached, (see *Reg.* v. *Thompson*, 1 *Ben. L. R. C. C.* at p. 9). Consequently, on the general principles of jurisprudence

the Penal Code would now be the substantive law in the case of offences committed on the high seas and tried in India. If we now look at the reasons for the judgment in the case of *Reg.* v. *Elmstone* we shall see that they lead to the same conclusion. The statute 30 & 31 Vict. c. 124, s. 11, provided that all offences of the class we are discussing should be "tried and determined" as if they had been committed within the local jurisdiction. These words are the words used in the commission of Oyer and Terminer, and under them the Commissioners pass sentences, hence the Court which decided *Reg.* v. *Elmstone*, at p. 122 of 7. *Bom. H. C. Rep. C. C.*, said:—"The direction to hear and *determine* the case, as if the crime had been committed within the limits of the ordinary jurisdiction of this Court, seemed to point towards the law prevailing within those limits as the substantive law applicable to the case." But the 30 & 31 Vict. 124 forms part of the Merchant Shipping Act, 1854, and this later Act specially preserves in force the 12 & 13 Vict. c. 96, the second section of which requires the punishment in all such cases to be according to the English law; therefore it was held by the Court to limit to that extent the meaning of the word "determine," and that English law was consequently the substantive law; see the reasoning at pp. 125 to 129. Now, however, the Statute 37 & 38 Vict. c. 27 has caused 12 & 13 Vict. c. 96, s. 2, to be of no effect whatever, although it does not in so many words repeal it, and we have the word "determine" not only left to have its full force as in England, but the local Courts are definitively empowered to punish in such a case as if the offence had been committed within the limits of the local jurisdiction. Thus it would appear that if the case of *Reg.* v. *Elmstone* had now to be considered, the Court would hold that the local law was the substantive law and not the English law.

This restores the law to the state in which it was under 9 Geo. 4. c. 74 (an Act for improving the administration of criminal justice in the East Indies), which by Sect. 25 enacts "*that all offences prosecuted in any of Her Majesty's Courts of Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land,*" *i.e.*, upon the land of British India, for

the Act goes on to provide for the punishment of acts upon the land of India. This section is one of the few sections of that Act which were left unrepealed by Act X. of 1875 and by the English repealing Acts of 1874, and although its operation was suspended by the Acts referred to in the case of *Reg.* v. *Elmstone*, it is now restored to full force by the 37 & 38 Vict. c. 27.

The Criminal Procedure Code, 1882, Sect. 221, provides that "*the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge*," and Sched. 5 to that Act, Sect. 28, shows by the forms of charges therein given that this provision is to be carried out by alleging that the offence charged is "punishable under" a certain section of the Penal Code, consequently, offences on the high seas when tried in India should now be charged as if they had been committed on land within the local jurisdiction; for it would be absurd still to charge them as punishable under an Imperial statute when the Act set out before says they are to be punished under the local Acts and not otherwise.

The arguments used in the foregoing pages, and the law laid down as to the form of charge proper for offences committed on the high seas has been approved of, and adopted by the High Court at Bombay in *Emp.* v. *Shaik Abdul Rahiman*, *B. R.* 31st August 1889.

If the act, neglect or default is not punishable by the local law, if committed within the local jurisdiction, then the case would come under the latter part of Sect. 3 of the 37 & 38 Vict. c. 27, and in this event it would still probably be proper and necessary to draw the charge under the English law most nearly applicable to the circumstances of the case.

As to the limits of Admiralty jurisdiction, especially as to the interval between high and low-water mark, see *Reg.* v. *Elmstone*, 7 *Bom. H. C. R.* 105; and *Reg.* v. *Pauline*, 9 *Jur. N. S.* 286, *S. C.* 3 *Notes of Cases*, 616; *Reg.* v. *Cunningham*, 28 *L. J. N. S. Mag. Ca.* 66; and 3 *Haggard Adm. Rep.* 275, 283, therein referred to. Whether the Admiralty has jurisdiction "in harbours below the bridges of great rivers near the sea, which are partly enclosed by the land, will be in most cases a question of fact rather than law, and determinable by local evidence. It is plain, however, that

the Admiralty can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide"; *East's Pleas of the Crown.*

PIRACY.

Piracy, *jure gentium*, is justiciable everywhere. Piracy "is only a sea term for robbery—piracy being a robbery within the jurisdiction of the Admiralty . . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods, with a felonious intention, in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy"; *Rex* v. *Dawson*, 13 *State Trials*, 454. And the same, of course, holds whether the dispossession be by mariners or passengers; *Attorney-General of Hong-Kong* v. *Kuok-a-Sing*, *L. R.* 5 *P. C.* 200. In this last case it appeared that it is provided in the Hong-Kong Ordinance 2 of 1850, that where it may appear to a magistrate or court that there is a probable cause for believing that a Chinese, who has taken refuge at Hong-Kong, has committed "any crime or offence against the laws of China," he may be imprisoned with a view to his being surrendered to the Government of China. On this it was held that in certain circumstances piracy would come within the Ordinance; as for example, if a Chinese went from the Chinese coast to plunder ships at sea, returning again to China with his plunder.

Where some of a large number of Chinese coolies, who were being taken from China to Peru in a French ship, killed the captain and several of the French crew, and then took the ship back to China, they were held to have been guilty of piracy *jure gentium.* But the piracy was held not to be an offence against the law of China within the meaning of the Ordinance. If they committed an act against the municipal law of any nation, it was against that of France; and if they were punishable by the law of China, it was only because they had committed an act of piracy, which *jure gentium*, is justiciable everywhere; *Attorney-General of Hong-Kong* v. *Kwok-a-Sing*, *L. R.* 5 *P. C.* 200.

ADMIRALTY JURISDICTION IN THE MOFUSSIL COURTS.

We have referred as yet only to the Admiralty jurisdiction of the High Courts, and till the passing of the Statute 23 & 24 Vict. c. 88, the Mofussil Courts had no such jurisdiction. But by 23 &

24 Vict. c. 88, s. 1, the provisions of 12 & 13 Vict. c. 96 were extended to India. Sect. 1 of 12 & 13 Vict. c. 96 provides that: —"*If any person in*" British India "*shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature soever, committed upon the sea, or in any haven, river, creek or place, where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to*" British India, "*then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in India shall have and exercise the same jurisdiction and authorities for the inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged, as aforesaid, to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of*" British India "*would and ought to have been had and exercised or instituted and carried on by them respectively, if such offence had been committed, and such person had been charged with having committed the same upon any waters situate within the limits of*" British India, "*and within the limits of the local jurisdiction of the courts of criminal justice.*"

By Sect. 2 :—"*Provided always that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to, in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding.*"

Sect. 3 provides that:—"*Where any person shall die in*" British India "*of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of*" British India, "*every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being*

accessory before the fact to murder, or after the fact, to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in" British India "*in the same manner in all respects as if such offence had been wholly committed in*" British India; "*and if any person in*" British India "*shall be charged with any such offence as aforesaid in respect of the death of any person who, having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, creek, or place where the admirals or admiral have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea.*"

The Act 37 & 38 Vict. c. 27, s. 3, modifies Sect. 2 of 12 & 13 Vict. c. 96 above quoted, by making the offence punishable under the local law, if there were any such applicable to the offence of which the person might be convicted in place of under English law.

Claim to be tried by High Court.—By Sect. 2 of Act 23 & 24 Vict. c. 88, it is provided that:—"*Where any person within any place in India is charged with the commission of any offence, in respect of which jurisdiction is given by* Act 12 & 13 Vict. c. 96; *or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in India; if at any time before his trial he make it appear to the court exercising criminal jurisdiction, in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place, he could have been tried only in the Supreme Court of one of the three presidencies in India, and claim to be tried by such Supreme Court accordingly, the said court exercising criminal jurisdiction, as aforesaid, shall certify the fact and claim to the governor of such place or chief local authority thereof, and such governor or chief local authority thereupon shall order and cause the person charged to be sent in custody to such one of the presidencies, as such governor shall think fit, for trial before the Supreme Court of such presidency; and the said Supreme Court and all public officers and other persons in the presidency shall have the same jurisdiction and authority, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed, within the limits of the ordinary jurisdiction of such Supreme Court.*"

CHARGE.

When a person, who would not but for special circumstances be liable to the jurisdiction of a particular court, is tried before that court, the charge ought to contain such a statement of facts as is sufficient to show the jurisdiction of the court. *Thus, if a person who is liable to punishment under the Penal Code by virtue of Sect.* 4, *the charge should run as follows :—*

That you, on or about the day of , then being a servant of and in the service of Her Majesty the Queen-Empress, at within the dominions of , a Prince (*or* State) in alliance with Her Majesty the Queen-Empress, did, &c.

If the jurisdiction be given by one of the notifications of the Government of India issued in September 1874, *the charge should run as follows :—*

That you, on or about the day of , then being a European British subject and a Christian, and residing in (*here insert place of residence which must be one of the places named in such notifications*) did at aforesaid, &c.

If the offence be committed within the admiralty jurisdiction the form of the charge should be as follows, or with such modifications as may be necessary to meet the circumstances of the particular case :—

That you, on or about the day of , then being a British subject on board the British ship , did, on the High Seas, and within the jurisdiction of the court, &c.

CHAPTER II.

General Explanations.

Sect. 6. *Definitions to be subject to exceptions.*—**Throughout this Code (the Indian Penal Code), every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision, or illustration.**

Illustrations.

(*a*) **The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.**

(*b*) **A, a police officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement, for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."**

Sect. 7. *Expressions always used in conformity with explanation.*—**Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.**

Sect. 8. *Gender.*—**The pronoun "he" and its derivatives are used of any person, whether male or female.**

Sect. 9. *Number.*—**Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.**

Note.

The word "include" is enlarging, not restrictive, and does not mean that the words must apply exclusively to that which they are to include; *ex parte Ferguson, L. R.* 6 *Q. B.* at p. 291; *The Gauntlet, L. R.* 3 *A. & E.* at p. 388.

Sect. 10. *Man—Woman.*—**The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.**

Sect. 11. *Person.*—**The word "person" includes any company or association or body of persons, whether incorporated or not.**

Sect. 12. *Public.*—**The word "public" includes any class of the public, or any community.**

Sect. 13. *Queen.*—**The word "Queen" denotes the sovereign for the time being of the United Kingdom of Great Britain and Ireland.**

Sect. 14. *Servant of the Queen.*—**The word "servant of the Queen" denotes all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 & 22 Vict. c. 106, entitled "An Act for the better Government of India," or by or under the authority of the Government of India or any Government.**

Sect. 15. *British India.*—**The words "British India" denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Vict. c. 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales Island, Singapore, and Malacca.**

Sect. 16. *Government of India.*—The words "Government of India" denote the Governor-General of India in Council, or during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively.

Sect. 17. *Government.*—The word "Government" denotes the person or persons authorized by law to administer executive government in any part of British India.

Sect. 18. *Presidency.*—The word "Presidency" denotes the territories subject to the government of a presidency.

Sect. 19. *Judge.*—The word "judge," denotes not only every person who is officially designated as a judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(*a*) A collector exercising jurisdiction in a suit under Act X. of 1859 is a judge.

(*b*) A magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a judge.

(*c*) A member of a punchayet which has power, under Regulation VII., 1816, of the Madras Code, to try and determine suits, is a judge.

(*d*) A magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a judge.

Sect. 20. *Court of Justice.*—The words "court of justice" denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body when such judge or body of judges is acting judicially.

Illustration.

A punchayet acting under Regulation VII., 1816, of the Madras Code, having power to try and determine suits, is a court of justice.

Sect. 21. *Public Servant.*—The words "public servant" denote a person falling under any of the descriptions hereinafter following, viz.:—

First, Every covenanted servant of the Queen.

Second, Every commissioned officer in the military or naval forces of the Queen while serving under the Government of India, or any Government.

Third, Every judge.

Fourth, Every officer of a court of justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the court; and every person specially authorised by a court of justice to perform such duties.

Fifth, Every juryman, assessor, or member of a punchayet, assisting a court of justice or public servant.

Sixth, Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any court of justice or by any other competent public authority.

Seventh, Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement.

Eighth, **Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience.**

Note.

A person appointed by the Government Solicitor with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as prosecutor in the Calcutta Police Court, is a public servant; *Emp.* v. *Butto Kristo*, *I. L. R.* 3 *Calc.* 497.

Ninth, **Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government; and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.**

Notes.

The word "officer" in this clause means a person employed to exercise to some extent a delegated function of Government. He must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an *Izaphatdar*, *i.e.*, a lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and therefore not a public servant under this clause; *Reg.* v. *Ramajirav Jibanjirav*, 12 *Bom. H. C. Rep.* 1.

A peon of the Collector's Court who received no fixed pay from the Government, but was remunerated by fees whenever employed

to serve process, and who was placed on the register of supernumerary peons, was held a public servant; *Reg.* v. *Ramkrishna Das*, 7 *B. L. R.* 447, *and sub nom. Reg.* v. *Ramkisto Dass*, 16 *W. R. Crim.* 27.

A servant of a bank carrying on the treasury business of the Government, and receiving a sum of money on account of Government, is a servant of the bank, and not a public servant; *In re Modun Mohun*, *I. L. R.* 4 *Calc.* 376; nor is a police officer under suspension, *Reg.* v. *Dinonath*, 8 *B. L. R. App.* 58.

A peon employed by the manager of an estate under the charge of the Court of Wards is not a public servant; *Reg.* v. *Arayi*, *I. L. R.* 7 *Mad.* 17.

A carter employed by Government is not a public servant; *Reg.* v. *Nachimuttee*, *ib.* 18.

Tenth, **Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey, or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town, or district.**

Illustration.

A municipal commissioner is a public servant.

Notes.

An engineer who receives and pays to others municipal moneys is a public servant within the meaning of this clause, although he may not have the power of sanctioning the expenditure of such moneys; *Reg.* v. *Nantaram Uttamram*, 6 *Bom. H. C. R. C. C.* 64. So is every registering officer appointed under Act VIII., of 1871, s. 82. A Municipal Corporation is not a public servant as distinct from its individual members; *Emp.* v. *Municipal Corporation of Calcutta*, *I. L. R.* 3 *Calc.* 758; 2 *C. L. R.* 520.

Explanation **1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.**

Explanation 2.—**Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.**

Note.

Any person, whether receiving pay or not, who chooses to take upon himself the responsibilities belonging to the position of a public servant, and performs those duties, and is recognized as filling the position of a public servant, must be regarded as one, *Emp.* v. *Parmeshar Dat, I. L. R.* 8 *All.* 201.

Sect. 22. *Movable property.*—**The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to any thing which is attached to the earth.**

Sect. 23. *Wrongful gain.—Wrongful loss.*—**"Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.**

A person is said to gain wrongfully when such person retains wrongfully as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

Sect. 24. *Dishonestly.*—**Whoever does any thing with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."**

Notes.

The word "dishonest" is not used in the Penal Code in its widest popular sense. In order to make an action dishonest there must be the intention of causing wrongful gain to one person or wrong-

ful loss to another. A person who attempts to obtain by means of a forged *sunnud* from a Settlement officer the recognition that he is entitled to the title of "*Loshur*" does not do it dishonestly, because there is no intention to cause wrongful gain or loss to any one; *Jan Mahomed* v. *Emp. I. L. R.* 10 *Calc.* 584. See also cases cited under Theft and Forgery.

Sect. 25. *Fraudulently.*—**A person is said to do a thing "fraudulently" if he does that thing with intent to defraud, but not otherwise.**

Notes.

Looking at the definitions given by Webster to "fraud" and "defraud," to defraud is to deprive of right, to keep possession, or to withhold by deception deliberately practiced with a view to gaining an unlawful advantage; but the decided cases give a rather wider interpretation to "fraud" and define it as an intention to deceive, whether from any expectation of advantage to the party himself, or from ill-will to the other, is immaterial; *Haycraft* v. *Creasy*, 2 *East, p.* 108, followed in *Emp.* v. *Vithal Narayen, I. L. R.* 13 *Bom.* 515 *n.* Fraud is a term which should be reserved for something dishonest and morally wrong, and should not be used where "illegality" is really the appropriate expression; *ex parte Watson*, 21 *Q. B. D. p.* 309.

There may be the intent without the power to defraud; *Reg.* v. *Nash*, 2 *Dears. C. C.* 500.

Where a person in the course of an action, brought against him to gain possession of property, uses a forged document for the purpose of supporting his title, though there was no necessity for the use of it, such use is clearly fraudulent; *Emp.* v. *Dhunum Kazee, I. L. R.* 9 *Calc.* 53. It is fraudulent to fabricate a recommendation of fitness for a vacant post and a letter of appointment thereto; *Abdul Hamid* v. *Emp. I. L. R.* 13 *Calc.* 349. The fabrication of receipts for the payment of rent, in lieu of genuine receipts, previously given, which had been lost, is not dishonest or fraudulent; *Emp.* v. *Sheo. Dayal, I. L. R.* 7 *All.* 459. See also *Emp.* v. *Syed Hoossain, ib.* 403. The intention to produce a false belief in the mind of a Settlement officer that a person is entitled to the title of "*Loshur*" is not an

intention to defraud; *Jan Mahomed* v. *Emp. I. L. R.* 10 *Calc.* 584. The intention of a person to screen himself from the detection of a fraud which he has already committed is not a fraudulent intention; *Abdul Hamid* v. *Emp. ubi supra.* See also cases cited and discussed under Forgery.

Sect. 26. *Reason to believe.*—**A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.**

Note.

The question to be determined under this section is not whether a man *believes*, but whether he has *reason to believe*. The word "believe" is much stronger that the word "suspect," and involves the necessity of showing that the circumstances were such that a reasonable person must have felt convinced in his mind that certain other circumstances existed, *e.g.*, that the property with which he was dealing was stolen property; *Emp.* v. *Rango Timaji, I. L. R.* 6 *Bom.* 402.

Sect. 27. *Property in possession of wife, clerk or servant.*—**When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.**

Explanation.—**A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.**

Sect. 28. *Counterfeit.*—**A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.**

Explanation 1.—**It is not essential to counterfeiting that the imitation should be exact.**

Explanation 2.—**Where a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing**

the one thing to resemble the other, intended by means of that resemblance to practise deception, or knew it to be likely that deception would be thereby practised. [Act I. of 1889, Sect. 9.]

Sect. 29. *Document.*—The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures, or marks are formed, or whether the evidence is intended for, or may be used in, a court of justice or not.

Illustrations.

A writing expressing the terms of a contract which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power of attorney is a document.

A map or plan which is intended to be used, or which may be used, as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures, or marks, as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures, or marks within the meaning of this section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The

endorsement is a document, and must be construed in the same manner as if the word "pay to the holder," or words to that effect, had been written over the signature.

Notes.

A writing which is not legal evidence of the matter expressed, may yet be a document within the meaning of this section if the parties framing it believed and intended it to be evidence of such matter; *Reg.* v. *Shifait Ali*, 2 *B. L. R. A. Cr. J.* 12, and 10 *W. R. Crim.* 6. In this case the document was a draft petition intended to be used as evidence of its contents. Thus, for an offence to be committed under Sect. 464, it is not necessary that the document as to which the forgery is alleged should, apart from such forgery, be legal evidence of the matter in such document contained.

Sect. 30. *Valuable security.*—**The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.**

Illustration.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

Notes.

A valuable security is not only a document which *is*, but also one which *purports to be*, a document described in this section; consequently an unstamped document which is not receivable in evidence in a civil court may be a valuable security; 7 *Mad. H. C. Rep. App.* 26; *Emp.* v. *Ramasami*, *I. L. R.* 12 *Mad.* 148.

A settlement of accounts in writing, although not signed by any person, is a "valuable security" within the meaning of this section; *Reg.* v. *Kapalavaya Saraya*, 2 *Mad. H. C. Rep.* 247.

A copy of a lease is not; *Reg.* v. *Khusal Hiraman*, 4 *Bom. H. C. R. C. C.* 28; a deed of divorce is a valuable security within this section; *Reg.* v. *Azimooddeen*, 11 *W. R. Crim.* 15. A *sunnud* granting a title is not a valuable security; *Jan Mahomed* v. *Emp. I. L. R.* 10 *Calc.* 584.

Sect. 31. *A will.*—**The words "a will" denote any testamentary document.**

Sect. 32. *Acts include omissions.*—**In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.**

Sect. 33. *Act—Omission.*—**The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omission as a single omission.**

Sect. 34. *Joint act.*—**When a criminal act is done by several persons in furtherance of the common intention of all** (Act XXVII. of 1870), **each of such persons is liable for that act in the same manner as if the act were done by him alone.**

Sect. 35. *Joint intent.*—**Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons, who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.**

Sect. 36. *Effect caused partly by act and partly by omission.*—**Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.**

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

Sect. 37. *Participation in series of acts.*—When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly, with any other person, commits that offence.

Illustrations.

(*a*) A and B agree to murder Z by severally, and at different times, giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(*b*) A and B are joint jailers, and as such have charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting each, during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(*c*) A, a jailer, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food, in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z

dies of hunger. B is guilty of murder; but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

Sect. 38. *Division of criminal act.*—Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks Z under circumstances of such grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

Sect. 39. *Voluntarily.*—A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration.

A sets fire by night to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here A may not have intended to cause death, and may even be sorry that death has been caused by his act, yet if he knew that he was likely to cause death, he has caused death voluntarily.

Sect. 40. *Offence.*—Except in the chapter and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV. and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216, and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

Notes.

In the Penal Code as it was originally passed, the word "offence" denoted only a thing punishable under the Code. Act XXVII. of 1870 amended the section and brought it into the form in which it now appears, except that, in the second clause, certain sections have been added by Act VIII. of 1882 and Act X. of 1886. The section as it is now printed contains all the amendments. Anything committed out of British India which is by a Statute made punishable as if it had been committed in British India at the place at which the offender is found would be a thing punishable under this Code.

Nothing contained in the amending Act XXVII. of 1870 is to be taken to affect any of the provisions of any special or local law (*Sect.* 15, *Act* XXVII. *of* 1870).

Sect. 41. *Special law.*—**A "special law" is a law applicable to a particular subject.**

Sect. 42. *Local law.*—**A "local law" is a law applicable only to a particular part of British India.**

Sect. 43. *Illegal—Legally bound to do.*—**The word "illegal" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.**

Sect. 44. *Injury.*—The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation, or property.

Sect. 45. *Life.*—The word "life" denotes the life of a human being, unless the contrary appears from the context.

Sect. 46. *Death.*—The word "death" denotes the death of a human being, unless the contrary appears from the context.

Sect. 47. *Animal.*—The word "animal" denotes any living creature other than a human being.

Sect. 48. *Vessel.*—The word "vessel" denotes anything made for the conveyance by water of human beings, or of property.

Sect. 49. *Year—Month.*—Wherever the word "year" or the word "month" is used it is to be understood that the year or the month is to be reckoned according to the British calendar.

Sect. 50. *Section.*—The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

Sect. 51. *Oath.*—The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to be made before a public servant, or to be used for the purpose of proof, whether in a court of justice or not.

Sect. 52. *Good faith.*—Nothing is said to be done or believed in good faith, which is done or believed without due care and attention.

Notes.

In deciding whether an act is done with due care and attention, regard must be had to the position of the person doing the act, and what might not be due care and attention in an educated man

in charge of a large office, might nevertheless be held to be such in one of his subordinates; *Bhawoo* v. *Mulji*, *I. L. R.* 12 *Bom.* 377.

A police officer, seeing a horse like one lost by his father tied up in a person's barn, seized it and arrested the person for theft without making any further enquiries; it was held that this was not done in good faith; *Reg.* v. *Mahomed Fazil*, 10 *W. R. Cr.* 20.

A man ignorant of surgery performing a dangerous operation can scarcely be said to act in good faith; *Sukaroo* v. *Emp.* *I. L. R.* 14 *Calc.* 566.

CHAPTER III.

PUNISHMENTS.

Sect. 53. *Punishments.*—**The punishments to which offenders are liable under the provisions of this Code** (Indian Penal Code) **are—**

First,—**Death.**

Secondly,—**Transportation.**

Thirdly,—**Penal Servitude.**

Fourthly,—**Imprisonment, which is of two descriptions, namely,**

(1) Rigorous; that is, with hard labour.

(2) Simple.

Fifthly,—**Forfeiture of property.**

Sixthly,—**Fine.**

Notes.

Whipping may also be adjudged as a punishment for certain offences (see Act VI. of 1864).

For the form in which sentence of death is to be pronounced, see Cr. P. C. 1882, Sect. 368.

In the case of a sentence of transportation no place of transportation is to be mentioned, see Cr. P. C. 1882, Sect. 368. Act IX. of 1882, Sect. 2, empowers the Governor-General to appoint places for the reception of transported convicts, and also empowers the Local Government to direct to which of such places convicts within its jurisdiction shall be sent.

Offences which are punishable with imprisonment, and for which the offender is also liable to fine, cannot be punished with fine only, but some term of imprisonment must be awarded; *Reg.* v. *Chenvioua*, 1 *Bom. H. C. Rep.* 4; *Reg.* v. *Rama bin Rubhajee*, *id.* 34; *Reg.* v. *Buheerjee bin Krishnajee*, *id.* 39; *Reg.* v. *Menazuddin*, 2 *W. R. Cr.* 33.

Sect. 54. *Commutation of Sentence of Death.*—**In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.**

Sect. 55. *Commutation of Sentence of Transportation for Life.*—**In every case in which sentence of transportation for life shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.**

Note.

See Sects. 401 & 402 of the Criminal Procedure Code.

Sect. 56. *Europeans and Americans to be sentenced to Penal Servitude instead of Transportation.*—**Whenever any person, being a European or American, is convicted of an offence punishable under this Code with transportation, the court shall sentence the offender to penal servitude instead of transportation, according to the provisions of Act XXIV. of 1855.**

Provided that where a European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the court seems fit, but not for life (Act XXVII. of 1870).

Sect. 57. *Equivalent of Transportation for life.*—**In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.**

Sect. 58. *Offenders sentenced to Transportation how to be dealt with until Transportation.*—**In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.**

Sect. 59. *Transportation instead of Imprisonment.*—**In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation of a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.**

Notes.

This section did not appear in the original draft of the Penal Code. In the report made by the Indian Law Commissioners in 1837, at p. 2 of their notes, they say :—"It will be seen that, throughout the Code, wherever we have made any offence punishable by transportation, we have provided that the transportation shall be for life," and they then proceed to give their reasons for so providing. The Commissioners who made a second report on the 24th June 1847, wrote at p. 163 :—"The second punishment, transportation may be substituted for death in all the capital cases. It is not allowed for any term short of life." Again, at p. 172, they report :—"With respect to transportation, from the absence of objection, it may be concluded that there is a general consent to the principle that the punishment shall be invariably for life." These remarks apply only to *principal* offences, the abetment of an offence, where not punishable by the same punishment as the principal offence, being punishable by imprisonment or fine only, as is the case in the Code itself, there being in the original bill no section dealing with attempts to commit offences. In the present Code, as passed, every *principal* offence punishable by

transportation was punishable by transportation for life and for no other term; *Reg.* v. *Meriam*, 10 *W. R. Cr.* 10. Sects. 121A, and 124A, however, made part of the Penal Code by Act XXVII. of 1870, provide for the offences described therein transportation for life *or any shorter* term, and under Sect. 511, an attempt to commit an offence punishable by transportation for life may be punished by a term of transportation not exceeding ten years.

A sentence of transportation, for a *principal* offence, or for an offence punishable as a principal offence, for a term less than life can only be passed under this section; consequently, when an offender is punishable either with transportation for life, or with imprisonment for a term which may extend to ten years, if a sentence of transportation for a term less than life is awarded, the term cannot exceed ten years; *Reg.* v. *Naiada*, *I. L. R.* 1 *All.* 43.

No sentence of transportation for less than seven years can be passed under this section on any charge; *Reg.* v. *Gour Chunder Roy*, 8 *W. R. Cr.* 2; but *this section* does not curtail the right of a court to pass a sentence of transportation for a shorter time under any other section which so provides.

The provisions of this section must be read in conjunction with those of the Criminal Procedure Code. Therefore, an ordinary magistrate, who can only sentence to two years imprisonment, cannot sentence to transportation for seven years or more, in lieu thereof, merely because the offence before him is *punishable* with imprisonment for seven years and upwards; but an officer empowered under Sect. 36 of the Criminal Procedure Code to imprison up to seven years, having passed this maximum sentence, may commute it for seven years' transportation; *Reg.* v. *Boodhooa*, 5 *R. C. C. Cr.* 20, 3 *Mad. Jur.* 151, and 9 *W. R. Cr.* 6.

To bring this section into operation, the punishment must be seven years' imprisonment for one offence alone, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation; *Reg.* v. *Mootkee Kora*, 2 *W. R. Cr.* 1 *Reg.* v. *Shonaullah*, 5 *W. R. Cr.* 44, *Reg.* v. *Gour Chunder Roy*, 8 *W. R. Cr.* 2; nor by adding a present sentence to an unexpired portion of another sentence; *Reg.* v. *Sakya valad Kaoji*, 5 *Bom. H. C. R. C. C.* 36.

A was convicted of an attempt to commit rape, and was sentenced by the judge to seven years' imprisonment, which he commuted to transportation for the same period. Held that under Sects. 376 and 511 a sentence of *imprisonment* for the offence committed could not be more than five years, and such sentence could not be commuted to transportation for a longer period, although, if the sentence of transportation had been passed in the first instance, it might have been for ten years; *Reg.* v. *Meriam*, 1 *Ben. L. R. A. Cr.* 5, and 10 *W. R. Cr.* 10.

This section does not authorize the substitution of transportation for the imprisonment to which a court can sentence an offender in default of payment of a fine; *Kunhussa* v. *Reg.*, *I. L. R.* 5. *Mad.* 28.

Sect. 60. *Sentence of Imprisonment wholly or partially rigorous or simple.*—**In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.**

Sect. 61. *Forfeiture of Property.*—**In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.**

Illustration.

A being convicted of waging war against the Government of India is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, A's father dies, leaving an estate which, but for the forfeiture, would become the property of A. The estate becomes the property of Government.

Sect 62. *Forfeiture of Property of Offenders punishable with Death, Transportation, or Imprisonment.*—**Whenever any person is convicted of an offence punishable with death, the court may adjudge that all his property, movable and immovable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported or sentenced to imprisonment for a term of seven years or upwards, the court may adjudge that the rents and profits of all his movable and immovable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.**

Notes.

Forfeiture of property is a punishment of which the infliction should be reserved for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances, for, by such punishment, not only is the prisoner punished, but his family is impoverished; *Reg.* v. *Mahomed Akhir*, 12 *W. R. Cr.* 17. No forfeiture at all can take place on sentence less than transportation or seven years' imprisonment; *Reg.* v. *Kripamoyee Chassanee*, 8 *W. R. Cr.* 35.

Sect. 63. *Amount of Fine.*—**Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.**

Notes.

The provisions of Sects. 63-70 apply to all fines imposed under the authority of any Act of the Legislative Council of India thereafter to be passed, unless it contains an express provision to the contrary; Act 1 of 1868, Sect. 5. By Ben. Act V. of 1867 the same sections were applied to all fines imposed by any future Act of the Bengal Legislative Council.

The description of fine which it is the object of the section to prohibit is one which it would be impossible or very difficult

for the accused person to pay, or wholly disproportioned to the character of the offence; *In re Abdoor Ruham*, 7 *W. R. Cr.* 37.

Sect. 64. *Imprisonment in Default of Payment of Fine.*—**In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to fine, it shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence.**

Notes.

This section is now in the form in which it appears as amended by Acts VIII. of 1882 and X. of 1886. In it the word "offence" denotes anything punishable under the Penal Code or under any special or local law; Sect. 40. This was introduced by Act VIII. of 1882, and does away with the Madras ruling that, where the accused was convicted under Sect. 48 of Act. XXIV. of 1859, and sentenced to pay a fine, or, in default, be imprisoned, the award of imprisonment in default of payment of fine was irregular, this section only applying to offences under the Code; 7 *Mad. H. C. Reps. App.* XXII.

Sect 65. *Limit of Term of Imprisonment when the Offence is punishable with Imprisonment as well as Fine.*—**The term for which the court directs the offender to be imprisoned in default of payment of a fine, shall not exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.**

Sect. 66. *Description of Imprisonment.*—**The imprisonment which the court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.**

Sect. 67. *Term of Imprisonment when the Offence is punishable with Fine only.*—**If the offence be punishable with fine only, the imprisonment, which the court imposes in default of payment of the fine, shall be simple, and** (Act VIII. of 1882, Sect. 3) **the term for which the court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale—that is to say: for any term not exceeding two months, when the amount of the fine shall not exceed fifty rupees; and for any term not exceeding four months, when the amount shall not exceed one hundred rupees; and for any term not exceeding six months in any other case.**

Notes.

In the case of an offence punishable by fine and imprisonment, *or* fine only, and the magistrate fines only, but allots imprisonment in default of payment of fine, the term of imprisonment is governed by this section, not Sect. 65; *Reg.* v. *Chunder Pershad Sing*, 10 *W. R. Cr.* 30. In Sects. 65, 66, and 67, the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Sect. 68. *Imprisonment to terminate upon Payment of the Fine.*—**The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.**

Notes.

The power of levying the fine is restricted to the court sentencing the offender, but the word "court" is not restricted to the particular person who held the office at the time the offender was sentenced. Therefore the successor of a session judge may levy

a fine imposed by his predecessor, and the same rule applies to other officers by whom fines are imposed; *Chunder Coomar Mitter* v. *Modhoosoodun Dey*, 9 *W. R. Cr.* 50.

Sect. 69. *Payment of Proportional Part of Fine.*—**If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.**

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

Notes.

A prisoner was sentenced to imprisonment and fine, and in default of payment of fine to a further term of imprisonment. He paid a portion of the fine, but that fact not having been communicated to the jailer, underwent the full term of imprisonment. Held that the court had no power to order the fine to be refunded; *Reg.* v. *Natha Mula*, 4 *Bom. H. C. R. C. C.* 37.

Sect. 70. *Fine may be levied within Six Years—Death of Offender.*—**The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.**

Notes.

See Sects. 386 to 389 of the Criminal Procedure Code, 1882.

The law has provided for the distress and sale of movable property only, and there is no way in which immovable property may be made liable to pay the fine. Immovable property cannot therefore be proceeded against even after the death of the offender; *Reg.* v. *Lallu Karwar*, 5 *Bom. H. C. R. C. C.* 63. Imprisonment in default of payment of fine is not a satisfaction of the fine, but a punishment for contempt; *Reg.* v. *Modhoon Soodhun*, 3 *W. R. Cr.* 61; and the fine may be recovered by distress within six years, even though the full term of imprisonment in default has been undergone. The bar of six years provided by the section may save the property of the accused, but not his personal arrest. The liability for any sentence of imprisonment, awarded in default of payment of fine, continues after the expiration of the six years; *Emp.* v. *Ganu Sakharam*, *B. R.* 8 *October* 1884.

Sect. 71. *Limit of Punishment of Offence made up of several parts.*—**Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.**

Where anything is an offence falling within two or more separate definitions of any law in force for the time being, by which offences are defined or punished, or where several acts of which one or more could by itself or themselves

constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences (Act VIII. of 1882, Sect. 4).

Illustrations.

(*a*) **A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.**

(*b*) **But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.**

Notes.

In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

The first clause of this section evidently refers to the case mentioned in Ill. (*a*), and to others of a similar nature, *e.g.*, a thief who goes into a building and steals a number of articles from different parts of it. The first part of the second clause provides for acts the whole of which taken together may be looked at as constituting an offence which may fall under two or more separate definitions of law, according to the view which may be taken of some portion of such acts; such cases are referred to in cl. 2 of Sect. 235 Cr. P. C. The second part provides for acts, a portion of which alone would constitute one offence, and another portion alone another offence, but which when combined form a totally different offence. No provision is, however, made for a series of acts, one part of which constitutes

one offence, and another part a separate offence, but which when combined do not constitute a third offence; *Emp.* v. *Sakharam*, *I. L. R.* 10 *Bom.* 493; see also *Reg.* v. *Abdool Azeez* 7 *W. R. Cr.* 59; and *Emp.* v. *Pir Mahomed*, *I. L. R.* 10 *Bom.* 254. Illustration (*b*) does, however, shew what should be done in such cases. Consequently, this last class of cases is governed by Sect. 235 Cr. P. C. alone, and separate sentences may be passed for each offence, *Emp.* v. *Sakharam*, *ubi supra*. The result is, in many cases, to enable an aggregate amount of sentence to be passed larger than that which could have been passed for the more serious of the two offences, and in some cases, *e.g.*, that put in Ill. (*b*) such a course might be right; yet, although separate sentences are strictly legal in such cases, yet where two distinct offences are really part of one transaction, it is not desirable to pass separate sentences for each offence, but one for the more serious offence which includes the lesser one; *Emp.* v. *Zor Singh*, *I. L. R.* 10 *All.* 146.

Housebreaking by night with intent to commit theft, and theft in a dwelling-house committed after the housebreaking is accomplished are distinct offences, which when combined are not punishable under any single section of the Penal Code, consequently it is legal to pass a separate sentence for each offence; *Emp.* v. *Kasinath Mahadu*, *B. R.* 11*th January* 1886; *Emp.* v. *Sukharam*, *I. L. R.* 10 *Bom.* 493; followed in *Emp.* v. *Nirichan*, *I. L. R.* 12 *Mad.* 36. This case, coupled with Ill. (*b*) to Sect. 235 Cr. P. C., does away with the ruling, in *Reg.* v. *Arjun*, 1 *Bom. H. C. Rep.* 87, and *Reg.* v. *Tukaya*, *I. L. R.* 1 *Bom.* 214. It must, however, be remarked that in a case of housebreaking with intent to commit theft, the actual theft of any article is the most cogent evidence of the intent, which might not otherwise be able to be proved; and as that offence is punishable with fourteen years' imprisonment, there is an ample range of punishment within which to award what is commensurate with the particular offence. It has long ago been ruled that there is no necessity, in a case of housebreaking with intent to commit theft combined with actual theft, to divide the charge into two counts (see the notes to Sect. 457), and Sect. 335 Cr. P. C. does not say that the accused *shall* be, but that he *may* be, charged with the two offences.

Riot and assault are not parts of the same offence; *In re Chunder Kant, I. L. R.* 12 *Calc.* 495.

Making a false charge, and subsquently giving false evidence in support of that charge are not parts of the same offence but distinct offences; *Reg.* v. *Abdool Azeez*, 7 *W. R. Cr.* 59; *Emp.* v. *Pir Mahomed, I. L. R.* 10 *Bom.* 254.

Rioting and grievous hurt committed in prosecution of the common object of the riot, are not parts of one and thes ame offence; *Emp.* v. *Bisheshar, I. L. R.* 9 *All.* 645. Separate sentences, however, should not be passed where the persons charged are only constructively guilty of voluntarily causing grievous hurt under Sect. 149; *Nilmony* v. *Emp. I. L. R.* 16 *Calc.* 442 (F. B.)

A prisoner charged under different sections with substantially the same offence, where the acts which are the basis of his conviction on one charge are the same as the acts which are the basis of his conviction on another charge, cannot be sentenced as for separate offences; *Reg.* v. *Zora Karubeg*, 4 *Bom. H. C. R. C. C.* 12; *Reg.* v. *Dina Sheikh*, 3 *B. L. R. A. Cr. J.* 15, *note*; and *Reg.* v. *Kali Sankar Sandyal, ib.* 14; *Reg.* v. *Chunder Kant*, 12 *W. R. Cr.* 2. The authority of the last three of these cases is somewhat weakened by the fact that Sect. 235 Cr. P. C. Ill. (*a*) makes a rescue from custody and *grievous hurt* inflicted during the rescue two separate offences; but still the principle laid down would seem to be a reasonable one and one which should be used in interpreting this section and Sects. 35 and 235 Cr. P. C., though, of course, there must always be a certain amount of difficulty in applying the principle to particular cases.

Where prisoners were convicted of three separate offences, but the magistrate had passed a single sentence of four years' rigorous imprisonment, it was held that the proper course would have been to give a separate sentence in each case, as in the event of appeal and reversal of the conviction in one or two of the cases, it would not have been practicable to determine to what portion of the aggregate imprisonment the prisoners remained liable; 4 *Mad. H. C. R. App.* XXVII.

Sect. 72. *Punishment of a Person found Guilty of one of several Offences.*—**In all cases in which judgment is given that a person is guilty of one of several offences specified in the**

judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.

Note.

See Sect. 236 of the Criminal Procedure Code, 1882.

Sect. 73. *Solitary Confinement.*—Whenever any person is convicted of an offence for which under the Code the court has power to sentence him to rigorous imprisonment, the court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say:—

A time not exceeding one month, if the term of imprisonment shall not exceed six months.

A time not exceeding two months, if the term of imprisonment shall exceed six months, and shall not exceed one year.

A time not exceeding three months, if the term of imprisonment shall exceed one year.

Sect. 74. *Limit of Solitary Confinement.*—In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Note.

Solitary confinement must not be imposed for the whole term of a person's imprisonment, even though not exceeding fourteen days; *In re Neyan Suk Mether*, 3 *B. L. R. A. Cr. J.* 49.

Sect. 75. *Punishment after previous Conviction in certain Cases.* **—Whoever, having been convicted of an offence punishable under Chapter XII. or Chapter XVII. of this Code, with imprisonment of either description for a term of three years and upwards, shall be guilty of any offence punishable under either of those chapters with imprisonment of either description for a term of three years and upwards, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years** [Act X. of 1886].

Notes.

The previous conviction must have been for an offence punishable with imprisonment for *not less than three years;* and the subsequent offence must also be punishable with imprisonment *for not less than three years.* If both these requirements are not fulfilled, this section cannot be acted on.

Then, *under this section,* there are two alternatives as to the amount of punishment by incarceration:—transportation for life, and for no shorter term, or imprisonment of either description for a term which may extend to ten years. It is further to be remarked that a fine in lieu of or in addition to a sentence of imprisonment is no longer lawful for a second offence of which the accused has been convicted under this section as it now stands.

If the term of imprisonment which is passed under this section amounts to seven years, then under Sect. 59 the term of imprisonment may be changed into a like term of transportation. Where the second offence is punishable with no longer a term of imprisonment than three years, there was, under this section as it formerly stood, no intermediate punishment between imprisonment for six years and transportation for life; *Reg.* v. *Gopala Santu, B. R.* 21, *November* 1876; *Emp.* v. *Mahadu, I. L. R.* 6 *Bom.* 690; and if the Judge who passed the sentence thought the prisoner ought to be sentenced to transportation, but not for life, the only course for him to pursue was to pass a sentence of transportation for life and then forward, through the proper channel, to the Government

a recommendation that the sentence which he had passed should be reduced to that term which he considered adequate under the circumstances.

The section as it now stands, altered by Act X. of 1886, does away with this difficulty and also with another which sometimes occurred, viz., whether an offender on a second conviction could be punished with imprisonment for any term not exceeding double the term for original offence, or whether he must, in all cases, receive double the amount of the original term, provided it did not exceed ten years. The general interpretation was in favour of the former alternative. Now, however, on a second conviction the offender can receive *any* amount of imprisonment up to ten years, and the amount of transportation can be also proportioned under Sect. 59, except that the court cannot pass any sentence of transportation between ten years and life, but, if it thinks that an intermediate term is desirable, must adopt the procedure before mentioned. A fresh difficulty has, however, arisen in cases, where the original offence is punishable with imprisonment for fourteen years, for if an offender who is convicted of an offence which is punishable for that term of imprisonment is charged with a previous conviction, he is then liable only to a smaller term of imprisonment, viz., ten years for the second offence, with of course the alternative of transportation for life. Possibly the Legislature thought that the punishment for such an offender on a second conviction ought to be transportation for life.

If a man, who has been convicted of an offence punishable under either of these two chapters with imprisonment for a term of three years and upwards, is subsequently convicted of an attempt to commit any such offence, he is not liable to the enhanced punishment provided by this section; *Emp.* v. *Nana Rahim, I. L. R.* 5 *Bom.* 140; *Emp.* v. *Ram Dyal, I. L. R.* 3 *All.* 773; *Emp.* v. *Sricharan Bauri, I. L. R.* 14 *Calc.* 356.

This section does not create a separate offence, but only imposes a liability to enhanced punishment. So where a magistrate sentenced a prisoner to six months' rigorous imprisonment under Sect. 457 of the Penal Code, and, finding the prisoner was liable to enhanced punishment under Sect. 75 of the Penal Code, sentenced

the prisoner to six months' further imprisonment under Sect. 314 of the Criminal Procedure Code, the latter sentence was set aside by the High Court; 5 *Mad. H. C. R. Cr. Rulings, App.* iii.

The object of this section is to provide for an additional and not for a less severe punishment on a second conviction, and recourse should not be had to it if the punishment provided for the offence is itself sufficient; *Sheo Saran* v. *Emp. I. L. R. 9 Calc.*, 877.

The previous offence must have been committed since the Penal Code came into operation; *Reg.* v. *Hurpaul*, 4 *W. R. Cr.* 9; *Reg.* v. *Muluck*, 3 *W. R. Cr.* 17; *Reg.* v. *Krishya bin Yesu*, 4 *Bom. H. C. C. Rep. Cr. C.* 11; *Budhun* v. *Emp. 10 C. L. R.* 392. The subsequent offence must also be one committed after release from prison upon the previous conviction; 1 *R. C. C. Cr. R.* 60; *Reg.* v. *Sankya Kanji*, 5 *Bom. H. C. Rep. Cr. C.* 36; *Emp.* v. *Megha, I. L. R.* 1 *All.* 637. Consequently, the date of the previous conviction should be entered in the charge; 1 *R. J. and P.* 562; and *Cr. P. C. Sect.* 221. Or if there should be any doubt as to whether the offence was really a prior one, then the date of the commission of the offence also should be inserted.

The previous conviction of the prisoner should be entered in the charge against him as a separate head, *Emp.* v. *Dorasami, I. L. R.* 9 *Mad.* 284; but should not be brought forward by the prosecution until after the prisoner has been convicted of or pleaded guilty to the subsequent offence; Sect. 310, Cr. P. C.

Charge.

"That he, the said A B, before the committing of the said offence, was convicted, to wit, on the day of in Calendar No. of on the file of , of an offence punishable under Chapter XVII. (*or* XII.) of the Indian Penal Code with imprisonment for a term of three years, to wit, with the offence of , which conviction is still in full force and effect; and that he, the said A B, is thereby liable to enhanced punishment under Sect. 75 of the Indian Penal Code, and within," &c.

Evidence.

Sect. 511, *Cr. P. C.* provides that in any inquiry, trial or proceeding under that Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force—

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction was had to be a copy of the sentence or order; or

(*b*) either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with evidence as to the identity of the accused person with the person so convicted.

Although when a prisoner is charged with having been previously convicted under this section, this charge cannot be taken any notice of until he has been convicted of the subsequent offence; yet a previous conviction can at any time be proved against an accused person by way of prejudicing him in the eyes of the jury; *Emp.* v. *Kartick Chunder*, *I. L. R.* 14 *Calc.* 721.

CHAPTER IV.

GENERAL EXCEPTIONS.

Note.

Throughout this chapter the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Sect. 76. *Act done by a Person believing himself bound by Law.*—**Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it.**

Illustrations.

(*a*) **A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.**

(*b*) **A, an officer of a court of justice, being ordered by that court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.**

Sect. 77. *Act of Judge when acting judicially.*—**Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.**

Sect. 78. *Act done pursuant to the Judgment of a Court of Justice.*—**Nothing which is done in pursuance of, or which is warranted by, the judgment or order of a court of justice, if done whilst such judgment or order remains in force, is an offence notwithstanding the court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.**

Sect. 79. *Act done by a Person justified, or by mistake of fact believing himself justified, by Law.*—**Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it.**

Illustrations.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

Notes.

The foregoing sections simply say that under the circumstances therein referred to certain acts shall not amount to offences—that is, shall not be punishable under the provisions of the Indian Penal Code—but leave untouched the liability in a civil suit of the persons who claim their protection. Thus, although illustration (*b*) to Sect. 76 exempts an officer of justice from liability to criminal punishment for the acts therein described, it still leaves him exposed to liability to a civil suit, the result of which must depend upon the peculiar circumstances of each case.

Sects. 76 and 79 declare in the first instance that nothing is an offence which is done by a person who is bound by law to do it, or is justified by law in doing it. This provision covers the case of a person who hangs a man in obedience to a sentence of death, although this is also covered by Sect. 78. It also covers the case put in Ill. (*a*), but then the superior officer's commands must be in accordance with law. The cases in which force may be used, and to what extent, to disperse an assembly of people are set out in Sects. 127 to 131 Cr. P. C. 1882; and by these sections the authority of magistrates and officers in the army or volunteers is

minutely laid down. The provision of Sects. 76 and 79 will also cover the case of private individuals assisting a police officer under the provisions of Sect. 42 Cr. P. C.; and private individuals to whom a warrant of arrest has been addressed, and persons aiding them under the provisions of Sect. 43 Cr. P. C.; and a person preventing by proper means a trespass or a nuisance on his own property.

These sections also provide for acts done under a mistake, but the mistake must be one of fact and not of law; the person desiring to shelter himself under them must be under a mistaken impression as to the existence or non-existence of a state of facts which, if it did exist, would authorise him to apply a known law to that state: it will not be sufficient that under a well-understood state of facts a mistake has been made in applying the law. In Ill. (*a*), if the officer's order be in conformity with the commands of the law, it is because he is right in law—and the soldier is, of course, bound to obey him; but if the officer is wrong in his law, although the soldier is, by military law, bound to obey him, yet the latter is not protected, but equally with his officer has committed an offence. It has been held in England that if a ship's sentinel shoots a man because he persists in approaching the ship when he has been ordered not to do so, the act will be murder, unless it was necessary for the ship's safety; *Rex* v. *Thomas*, 1 *Russ. C. & M.* 823, in which case it appeared that the prisoner was a sentinel on board the Achille while she was paying off, and had received orders from the preceding sentinel to keep off all boats, unless they had officers in uniform in them, or unless the officers on board allowed them to approach; and he received a musket, three blank cartridges, and three balls. Boats pressed upon the ship, and would not keep off although repeatedly warned to do so; whereupon the prisoner fired at the man in one which persisted in coming nearer and closer than the others, and killed him. The jury found that the sentinel had fired under the mistaken impression that it was his duty to do so: but the judges were nevertheless unanimously of opinion that the act amounted to murder; but that if the act had been necessary for the preservation of the ship—as if, for instance, the deceased had been endeavouring to stir up a mutiny—then it would have been justifiable. Soldiers

are only armed citizens; and the orders of their officers do not justify any acts of violence, unless the orders themselves are legal. In *Reg.* v. *Hutchinson*, 9 *Cox C. C.* 555, it was held that, where a gun, discharged in the ordinary and regular course of ball-practice by an artilleryman in a garrison town, missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one, and open to all Her Majesty's subjects, and the artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the defendant the major-general, that the major-general was not guilty of manslaughter, because he was doing an act which he was justified by law in doing, and did not do it negligently or in an improper manner.

The same principle applies to other officials. No official is excused in doing an illegal act, although ordered to do it by his superior; and the inferior is supposed to be cognisant of what is and what is not legal. Not even the orders of the Supreme Government of India, or of the Secretary of State for India, would excuse an illegal act, unless the whole transaction was a State act; or else total or partial immunity is given by some Act or Statute. Thus the 21 Geo. 3 c. 70, ss. 1 to 3 provide "that the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered or done by them in their public capacity only, and acting as Governor-General in Council." And, "that if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court, for any act or acts done by the order of the said Governor-General in Council in writing, he or they may plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done, has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said court. Provided always that, with respect to such order or orders of the said Governor-General in Council as do or shall extend to any British

subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this act had never been passed." This, however, does not prevent the Governor-General and his Council being sued in England, see Sects. 4 to 6; and *Reg.* v. *Eyre*, *L. R.* 3 *Q. B.* 487. Similar exemptions are provided in respect of the Governor-General, and the Governors and Councils of Madras and Bombay by the 39 and 40 Geo. 3, c. 79, s. 3, and 4 Geo. 4, c. 71, s. 7; and the charters of the Supreme Courts prohibit those courts from trying any suit against the Governor-General or the Governors or any of their Council for anything done as Governor-General or Governor in Council; and from trying any indictment against the Governor-General, or Governors or any of the Council, except for treason or felony.

Under Reg. III. of 1818 and Act III. of 1858, the Governor-General in Council has the power of detaining persons in custody without any charge being made against them, under circumstances set forth in that regulation, consequently those who act under an order of the Governor-General in Council made in the form provided by that regulation are protected against either criminal or civil proceedings; see *In re Ameer Khan*, 6 *B. L. R.* 392.

An act of State is an act which has been done by a sovereign power to an independent or semi-independent State, or to the subject of another State, or to one of its own subjects in a state of rebellion, and not an ordinary transaction between a State and its subjects; *Le Caux* v. *Eden*, 2 *Doug.* 594; *Lindo* v. *Rodney*, 2 *Doug.* 613; *Syed Ally* v. *The East India Company*, 7 *Moore's I. A.* 555; *Kamachee Boye* v. *The East India Company*, 7 *Moore's I. A.* 476; *The ex-Rajah of Coorg* v. *The East India Company*, 29 *Bear.* 300; *Raja Saligram* v. *Secretary of State*, 12 *B. L. R.* (*P. C.*) 167, 184; *Doss* v. *Secretary of State*, *L. R.* 19 *Eq.* 509; *Sirdar Bhugwan* v. *Secretary of State*, 2 *I. A.* 38; or else something which arises out of transactions between the sovereign and another independent power; as where the Emperor of China on making a treaty of peace with Her Majesty paid over a sum of money as an indemnity for losses sustained by British subjects, in which case the courts held that they had no right to interfere with the way in which that money was distributed among those who had suffered loss; *Rustomji* v. *The Queen*, *L. R.* 1 *Q. B. D.* 487, and *L. R.*

2 *Q. B. D.* 69. An act which, if done by the express order of the Crown, would be an act of State, becomes one, by subsequent ratification, by the Crown; *Buron* v. *Denman*, 2 *Exch.* 167; approved of in *Kamachee Boye* v. *The East India Company*, *ubi supra*; *Mir Zuleef* v. *Yeshvadabai*, 9 *Bom. H. C. Rep.* 314. Nothing done professedly under the sanction of municipal law, and in exercise of powers conferred, or supposed to be conferred, by that law is an act of State, although it is done by the sovereign power, and is an act which could not possibly be done by a private person; *Hari Bhanji* v. *Secretary of State*, *I. L. R.* 4 *Mad.* 344; in appeal, *I. L. R.* 5 *Mad.* 273; dissenting from *Nobin Chunder* v. *Secretary of State*, *I. L. R.* 1 *Calc.* 11. See also *Forester* v. *Secretary of State*, 12 *B. L. R.* (*P. C.*) 120, 150, which does not seem to have been referred to in the case in Calcutta just referred to.

Persons carrying out an act of State under proper orders will be protected by these sections, in the same way as if they were carrying out an order lawful under the municipal law.

The liabilities and immunities of judicial officers have been carefully discussed and decided in the English courts; but as most of the decisions are upon the question whether or not they are liable to an action at the suit of the party alleged to be injured, it is evidently unnecessary to cite those decisions here, as the present sections refer to criminal proceedings only: but it may be useful to quote a few of the cases where the court gave judgment on applications for criminal informations against judicial officers. In this class of cases it is laid down that when a justice of the peace acts from indirect or corrupt motives, the court will punish him by information; *Rex.* v. *Cozens*, 2 *Doug.* 426. But no information will be granted against justices acting in sessions, except in very flagrant cases; *Rex.* v. *Seaford*, 1 *W. Bl.* 432. On an application for a rule *nisi* for a criminal information against a magistrate, the question is not whether the act done might on full investigation be found to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives (under which fear and favour may generally be included), or from mistake or error; in either of the latter instances the court will not grant the rule; *Reg.* v. *Barron*, 3 *B. and Ad.* 432; *In re Fentiman*, 2 *A. and E.* 127; *Reg.* v. *Badger*, 4 *Q. B.* 468, 7 *Jurist*, 216, and 12 *L. J. M. C.* 66. So wherever

magistrates act uprightly, though they mistake the law, no information will be granted against them; *Rex* v. *Jackson*, 1 *T. R.* 653.

The court will not grant an information against a magistrate for having improperly convicted a person unless the party complaining makes an exculpatory affidavit denying the facts; *Rex* v. *Webster*, 3 *T. R.* 388. And in all cases the party applying for an information must come into court with clean hands; *Rex* v. *Eden*, *Lofft.* 72.

A criminal information was refused against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk, the conviction being warranted by the facts; *Rex* v. *Barker*, 1 *East.* 186. So, too, a rule *nisi* for an information for making a commitment without previously taking the prosecutor's oath who was a peer of the realm, and also for neglecting to take the noble prosecutor's recognisance to prosecute, was discharged, these omissions being deemed only irregular, not criminal; *Rex* v. *Fielding*, 2 *Burr.* 719. But where a magistrate upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself or some other magistrate, and purporting that informations had been given to him (the magistrate) on oath, whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs; *Rex* v. *Whately*, 4 *M. & R.* 331.

An information will be granted against justices of the peace as well for granting as for refusing a licence for the sale of ale improperly; *Rex* v. *Holland*, 1 *T. R.* 692; as from motives of resentment; *Rex* v. *Harris*, 3 *Burr.* 1716; or because the applicant voted for members of Parliament for the borough against the recommendation of the justice; *Rex* v. *Williams*, 3 *Burr.* 1318.

A rule for a criminal information will not be granted against justices who wrongly or improperly reject bail, unless it manifestly appears to the court, by satisfactory and conclusive evidence, that they were influenced by partial and corrupt motives; *Rex* v. *Badger*, 6 *Jur.* 994 (*Bail Court*). Where the pecuniary sufficiency and

solvency of bail are undisputed, the rejection of such bail on the ground of a coincidence of political opinion with the person or persons for whose appearance the bail offer to become security is improper, even though such rejection by the justices is reconcilable with the absence of corrupt motives; *ib.*; and where justices do reject bail on the ground that parties entertain objectionable political opinions, and on other grounds which are concealed and not stated, the court will grant a rule *nisi* for a criminal information; *ib.*; and where, in answer to such a rule, the justices deposed that they were not actuated by any corrupt or malicious motive in pursuing the course they had adopted, although the court discharged the rule, the justices were required to pay all the costs; *S. C.* 4 *Q. B.* 468; 7 *Jur.* 216 and 12 *L. J. M. C.* 66.

The provisions of Sect. 77 only protect a "judge," *i.e.*, "every person who is officially designated as a judge," and "every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment"; *Sect.* 19, *I. P. C.*; but not "a magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court," though it is very probable that, in respect to the granting or refusing bail during the pendency of such a charge, or on commitment, he would be held to be a judge, seeing that this is a "legal proceeding" in which he is empowered to give a definitive judgment, on grounds and under powers unconnected with the facts on which, or the powers under which, the commitment is made. The judge must be acting judicially, that is, he must be acting in a matter and place where he has jurisdiction, and must be actually exercising his judicial functions in the matter in hand; or else he must, exercising due care and attention, believe that he has jurisdiction to act in the matter, but if he had the knowledge, or means of knowledge of which he ought to have availed himself, he cannot be held to have been acting in good faith; see *Calder* v. *Halket*, 2 *Moore I. A.* 293; *Spooner* v. *Juddow*, 4 *Moore, I. A.* at p. 379; *Leete* v. *Hart*, *L. R.* 3 *C. P.* 322: *Griffith* v. *Taylor*,

2 *C. P. D.* 194; *Collector of Sea Customs* v. *Punniar*, *I. L. R.* 1 *Mad.* 89.

An officer of a court is ordinarily bound to obey every order of the court to which he is subject; and it must be a very flagrant overstepping of jurisdiction, and one which is apparent on the face of the authority under which he was acting, which would justify him in refusing obedience, for in all cases, in the first instance at any rate, the court itself has to decide the question of jurisdiction, and that judgment is binding until it is reversed by a superior court; and thus the law would always presume very strongly that the person doing the act in good faith believed that the court had jurisdiction.

Where *peons*, acting under civil process, arrested a witness on his way to court, who, as such, was privileged *eundo, morando et redeundo*, and persisted in the arrest after due notice, it was held that they were not protected under this section, as, although the officer issuing the warrant had jurisdiction, yet special circumstances had arisen after the issue which took away the jurisdiction of the *peons* to execute the warrant; 5 *R. J. & P.* 43. So in a case where a bailiff in executing process against the movable property of a judgment debtor, broke open the gate; 3 *R. C. C. Cr.* 8.

As under Sect. 77 the protection thereby given is restricted to a certain class of judicial officers, so under Section 78 protection is afforded only to officers acting under the authority of a "judgment or order" of a "*judge* who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, *when such judge or body of judges is acting* judicially"; *Sect.* 20, *I. P. C.*, and this last proviso is also introduced *totidem verbis* into the body of Sect. 77: and in respect of this the Privy Council say, in *Calder* v. *Halket*, 2 *Moore, I. A.* at p. 301, "It is not merely in respect of acts in court, acts *sedente curiâ*, that a judge has immunity, but in respect of all acts of a judicial nature; and an order of the Foujdaree Court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was irregularity or error in it or not, would be dispunishable by ordinary process of law."

Furthermore, all these sections require "good faith"; and "nothing is said to be done or believed in good faith which is done or believed without due care and attention"; *Sect.* 52, *I. P. C.*

In the case of *Sheo Surun* v. *Mahomed Fazil*, 10 *W. R. Cr.* 20, it was decided that a police officer had not acted in good faith, and the facts as stated were these: "He sees a horse tied without any attempt at concealment in Bookoo's premises, and, because the animal happens to resemble one which his father had lost a short time previously, he jumps at once to the conclusion that Bookoo has either stolen the horse himself, or has purchased it from the thief, and he compels Bookoo to account for the possession accordingly. He finds that Bookoo bought the animal from one Sheo Surun Sahai, so he sends for that individual, charges him with the theft, and compels him to give bail for his appearance whilst an investigation is pending. The sub-inspector never sent for the supposed owner of the horse, or took the trouble of getting any credible information as to whether it was his father's horse or not. Had he done so, he would have found that the horse had already been discovered in another place; but without waiting for such information, and without making any further inquiry, he at once held Sheo Surun to bail, as a person suspected of having come by the animal dishonestly"; and the court held that the sub-inspector had not only not acted with due care and attention, but had not exercised any care or attention at all. When a person, having received information which causes him to suspect another of a felony which has in fact been committed by some one, gives him into custody without availing himself of a ready and obvious mode of ascertaining the truth as to whether or not the accused had in fact committed the felony, the absence of inquiry is an element in determining the question of the existence of reasonable and probable cause; *Perryman* v. *Lister*, *L. R.* 2 *Exch.* 197, and 37 *L. J. N. S. Exch.* 166; and also an important element in determining whether a person has acted with due care and attention.

Where a police constable, against whom no malice is proved, who is placed on duty for the express purpose of preventing stolen property being carried off, sees at an early hour of the morning a

person carrying a bundle, and questions him about the bundle, and not being satisfied with the answers he receives, takes him into custody, he cannot be said to have acted otherwise than with due care and attention, even though his superior officer to whom the person arrested is taken does not take the same view of the answers as the constable did; *Bhawoo* v. *Mulji*, *I. L. R.* 12 *Bom.* 377.

Sect. 80. *Accident in the doing of a lawful act.*—**Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.**

Illustration.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

Notes.

This section requires a determination of two sets of questions —one of law, and the other of fact. The court must decide what acts, manner, and means, are lawful; and the jury, or the court as a jury, must decide whether those charged against the accused agree or not with what is lawful; and also whether proper care and caution has been exercised. For although, if in the prosecution of a lawful act, a pure accident arises, no criminal or civil responsibility attaches to the actor; *Reg.* v. *Murray*, 5 *Cox C. C.* 509; yet it seems that it is otherwise where any blame is imputable, though the person is innocent of any intention to injure, as, if he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another; *Wakeman* v. *Robinson*, 1 *Bing.* 213. If a person is driving a cart at an unusually rapid pace, and drives over another and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so if he had not been in a state of intoxication; per *Garrow*, J., in *Rex* v. *Walker*, 1 *C. and P.* 320. And if two carriages are driving close together, apparently racing, the question for the jury, as laid

down by *Patteson*, J., in *Rex* v. *Timmins*, 7 *C. and P.* 499, is "whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends upon whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however, he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act he would be answerable."

These two points are constantly mixed the one with the other, and it is utterly impossible entirely to separate them, because circumstances are so constantly changing that it is impossible to lay down a rigid rule of law as to what constitutes negligence under all combinations of events. The care and caution which the law requires is not the utmost possible, but only a reasonable precaution which in the ordinary course of things would be sufficient, and that, of course, varies with every case, and what is negligent under one set of circumstances, is quite excusable and justifiable under another. Thus, the fact that streets are unusually crowded from a public procession or any other cause, instead of excusing a driver when proceeding at his ordinary pace, and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally responsible from any accident ensuing from driving at a rate and with those precautions which he might have ordinarily observed; *Reg.* v. *Murray*, 5 *Cox C. C.* 509.

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but some affirmative evidence of negligence on the part of the defendant must be given; *Hammack* v. *White*, 11 *C. B. N. S.* 588, 31 *L. J. N. S. C. P.* 129. But accidents may be of such a nature that negligence may be presumed from the mere fact of the accident, or the mere fact of such an accident happening may be *primâ facie* evidence of negligence, so as to throw on the defendant the duty of showing that there was no negligence; *Byrne* v. *Boadle*, 2 *H. and C.* 722, 33 *L. J. N. S. Exch.* 13; *Scott* v. *London Dock Company*, 3 *H. and C.* 597, 10 *Jur. N. S.* 1107. On the contrary, there are cases where the accident carries on its face the impress of the absence of negligence. Thus, where a man discharged his gun before he went out to dinner, and on return-

ing took it up and touched the trigger, when it went off and killed his wife, although the man was bound, in handling such a dangerous weapon, to take extra care, as illustrated in the preceding paragraph, yet seeing the fact was, that in his absence some one else had reloaded the gun without his knowledge, *Foster*, J., directed an acquittal, "being of opinion, upon the whole evidence, that he had reasonable ground for believing the gun was not loaded"; *Foster, Cr. L.* 265. So, too, in *Alison's L. Crim.* 144, there is a case cited in which the prisoner was charged with having fired a fowling-piece loaded with small shot, in a field within sight of a highroad, where persons frequently passed, and in the direction of the road, and killed a girl who was passing at the time. It appeared in evidence that the shot was really a long one, being above fifty yards, and that it proved fatal only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly penetrated the skin. The court held that the death was accidental under those circumstances, and so the jury found. It has further been laid down by *Willes*, J., in *Reg.* v. *Birchall*, 4 *F. and F.* 1087, that a man is not criminally responsible for the death of another party caused by his negligence, where he would not have been civilly liable in an action in respect of the alleged negligence, at the suit of the party injured, if the injuries sustained had fallen short of causing his death.

There is one other very important class of cases—poisoning by the administration of medicines, and killing by surgical operations, which, however, will be more properly treated under Sects. 87, 88, and 89.

Sect. 81. *Act likely to cause harm, but done without a criminal intent, and to prevent other harm.*—**Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.**

Explanation.—**It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk**

of doing the act with the knowledge that it was likely to cause harm.

Illustrations.

(*a*) **A, the captain of a steam-vessel, suddenly, and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur the risk of running down a boat C, with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C, and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C, by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him incurring the risk of running down the boat C.**

(*b*) **A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.**

Notes.

This is a section which is very difficult to comment on or elucidate. It is involved in its wording; the explanation practically says that it is a question of fact whether its provisions apply to a particular case, and the illustrations simply confirm the explanation without

in any way helping to determine the question of fact on which the application of the whole section turns. There is only one illustration which can be obtained from the English law, but even that scarcely comes under this section, but rather under Sect. 96 and the following sections; and this one case, under the principle of which illustration (*b*) might perhaps be classed, is thus alluded to by Archbold:—"There is one species of homicide *se defendendo* where the party slain is equally innocent as he who occasions his death; as, for instance, the case mentioned by Lord Bacon (*Elem. c.* 5; see also *Hawk, c.* 28, *s.* 26), where two persons, being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned. This homicide is excusable through unavoidable necessity, and upon the principle of self-defence." But this principle has, however, been lately dissented from in the case of *Reg.* v. *Dudley*, 14 *Q. B. D.* 273, where it was held that to cause the death of a dying man, even for the purpose of the survivors feeding on his flesh and thus preserving their own lives, was murder.

No theory can be started by which it can be decided where the necessity of doing harm arises in which there shall be an absence of "criminal intention" or the presence of "good faith." Certainly it must arise from accident or from the crime of another, not from the negligence or crime of the person doing the harm. In the opinion of the framers of the Penal Code, a theft to satisfy the direst hunger would not come within this section, for they say in their report: "Nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not deter him from committing theft. Yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, yet it is very likely to keep him from being in

a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft, but is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man to that condition in which no law will keep him from committing theft."

To further elucidate this very vague section, it may not be useless to transcribe a series of propositions and definitions from that part of Mr. Stephen's 'General View of the Criminal Law of England' which is devoted to "the definition of crime in general." "An action may be said to consist of occurrence to the mind, deliberation, resolution, intention, will, and execution by—or, if the expression be allowed, translation into—a set of bodily motions co-ordinated towards the object intended; . . . but, in order that there may be any action at all, the will which causes and the intention which co-ordinates bodily action must always be present. The absence of both or either would prevent the action from taking place at all, or reduce it from an action to a mere occurrence, and in either case there would be no crime.

"In order to illustrate this, cases may be put to show the effect of the absence of both or either. First, Will and intention may both be absent. A man in a convulsive fit strikes another and kills him. He has committed no crime, because he has done no act; he has been acted upon. . . .

"Secondly, Will may exist without intention. This case is best illustrated by the motions of an infant. . . . Probably, somnambulism and other movements during sleep are of the same kind. . . .

"Thirdly, Intention may exist without will. This happens in the common case of a person who lays aside a plan he has formed. . . .

"The result of the whole is, that an action consists of voluntary bodily motions, *combined by the mind towards a common object.* Intention is in every case essential to crime, because it is essential to action; and every crime is an action, as appears from the use of active verbs in every indictment.

"Such are the mental conditions which belong to a crime as an action; but other mental conditions are attached to actions before

they can be punished by the law. No action is criminal in itself unless the intent, the mental element of it, is a state of mind forbidden to the law. This state of mind varies according to the nature of the case. To utter a forged note is no crime, unless there be a knowledge that the note is forged, and also an intent to defraud. In order to bring a person within the statute which makes the infliction of certain bodily injuries felony, there must be specific intent to commit murder or to inflict grievous bodily harm; killing is no murder unless there be malice. The appropriation of the property of another is not theft unless it be felonious. In short, in order to be a crime, an action must not only be intentional in the general sense already explained, but it must be accompanied with a specific intention forbidden by the law in that particular case.

"In some cases the specific intent is defined by the law which creates the offence—as, for example, in the case of wounding with intent to maim or disfigure; but it is more frequently denoted by the general term 'malice.' Malice may thus be said to be a necessary ingredient in one form or other of all crimes whatever. . . .

"The etymological meaning of the words malice and malicious is simply wickedness and wicked. . . .

"It is easy to exaggerate the vagueness of these words. In reality, the difficulty lies, not in the use of the words themselves, but in the theories by which we try to explain them. The proposition that lying is wicked is understood by millions who are ignorant of the very existence of all moral theories whatever. It means that, in point of fact, it is blamed and under certain circumstances punished. The reason why it is blamed and punished are collateral to the fact; and it is with the facts and not with the theories about them that the law is concerned.

"Whatever may be the want of precision of these words it has in practice been remedied by experience. The consequences of making malice in general terms a necessary element of crime is that certain acts—as, for example, the destruction of life or the appropriation of what belongs to another—are declared to be *primâ facie* wicked actions, though circumstances may exist by which their wickedness is either removed or diminished. In the course of time experience shows what these circumstances are, and thus

a technically exact conception of both theft and murder is gradually attained, although the original definition of each contained a term which was indefinite when it was first used. Thus, in the case of murder, where one man kills another, the presumption is that he did so maliciously, and so committed murder; but this presumption may be rebutted by showing that the act was done in self-defence, or under certain specified provocations, or by certain forms of negligence.

"If it be asked why, under these circumstances, the term malice should be retained, and why murder, for example, should not be defined to mean the killing of a man under any other circumstances than those specified, the answer is that the word is convenient, because it sums up in a significant way many distinct propositions, and also because it is possible, although improbable, that new cases may arise in which it would be necessary to use it in its natural sense. Suppose, for example, that in a wreck, fire, or other catastrophe, a bystander were to kill one person for the sake of saving another, the question whether or not this was murder would turn on the question whether it was or was not identical in principle with acts which the law has determined to be malicious or wicked. The general result of the use of the word malice, and of the doctrine that malice is an essential element of crime, is to throw upon persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the Legislature, but at the same time to permit them to give evidence to that effect."

Where a person placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief who was in the habit of stealing his toddy, and the toddy was drunk by some soldiers who purchased it from some unknown vendor and were injured by it, it was held that the accused was rightly convicted under Sect. 328, and that he could not defend himself under this section; *Reg.* v. *Dhania*, 5 *Bom. H. C. Rep. C. C.* 59.

Sect. 82. *Act of a child under seven years of age.*—**Nothing is an offence which is done by a child under seven years of age.**

Sect. 83. *Act of a child above seven and under twelve years of age.*—**Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.**

Notes.

These two sections alter the English law, only by reducing the age of mature understanding from fourteen to twelve years. By that law "an infant shall be *primâ facie* deemed to be *doli incapax*, and to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years and will depend upon the particular facts and circumstances of the case. The evidence of malice, however, which is to supply age, should be clear and strong beyond all doubt and contradiction"; 1 *Russ.* 7. An infant under the age of seven years cannot incur the guilt of felony; *Marsh* v. *Loader*, 14 *C. B. N. S.* 535, 11 *W. R.* (*E.*) 784.

If a child, more than seven and under fourteen (under the Penal Code, under twelve), is indicted for a felony, it will be left to the jury to say whether the offence was committed by him, and if so, whether at the time of the commission of the offence the prisoner had a guilty knowledge that he or she was doing wrong; and the presumption of law is that a child of that age has not such guilty knowledge, unless the contrary is proved; *per Littledale*, J., in *Rex* v. *Owen*, 4 *C. and P.* 236. And this maturity of understanding must be affirmatively proved by the prosecution; *Reg.* v. *Vamplew*, 3 *F. and F.* 520; and must in most cases be inferred from surrounding circumstances. A boy of ten years old was convicted before Chief Justice *Willes* of the murder of a girl of five years of age, but the Chief Justice respited the execution, lest the punishment of such a child by death should be deemed to savour of cruelty; but the judges held that the circumstances of the case showed so much cunning that the boy ought to suffer as an example to others; and the convict would have been hanged, but for the interposition of the Secretary of State; *R.* v. *York*, *Fost.* 70. In this case the judges to whom the case was referred said:—

"That there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls 'a mischievous discretion,' that he was certainly a proper subject of capital punishment, and ought to suffer; for it would be of a very dangerous consequence that children may commit such crimes with impunity." Where a child of nine years of age stole a necklace, valued at Rs. 2-8, and immediately afterwards sold it to the accused for five annas, and the child was discharged under this section, but the accused was convicted, it was held, that the act of the child, though under twelve years of age, showed that he had attained sufficient maturity of judgment to judge of the nature and consequences of his conduct, and that there was, therefore, a theft, and that the accused was rightly convicted; *Reg.* v. *Begarari Krishna, I. L. R.* 6 *Mad.* 373.

In England, a child who, at the time of the commission of the offence of rape, is under fourteen, cannot, in point of law, be guilty of an assault with intent to commit a rape; and if he is under that age, no evidence is admissible to show that, in point of fact, he was physically able to commit that offence; *Rex.* v. *Phillips*, 8 *C. and P.* 736; *Rex.* v. *Groombridge*, 7 *C. and P.* 582. And in England it has been further held that a boy under fourteen years of age cannot be convicted of feloniously carnally knowing and abusing a girl under ten years of age, even though it was proved that he was arrived at the full state of puberty; *Rex.* v. *Jordan*, 9 *C. and P.* 118; *Rex.* v. *Brimilow*, *ib.* 366. In the Penal Code there is no provision corresponding with the law as laid down in these two decisions, and also in 1 *Hale*, 631; and under the words of Sect. 83 a boy under the age of twelve might be convicted of rape, though, of course, the prosecution would have to show conclusively that the accused had attained the full state of puberty. There is, however, a case cited in 1 *Morley's Dig.* 190, s. 636, where a boy only ten years old was convicted by the Futwa of rape on a girl only three years old, and the Court of N. A. viewed it as an attempt only, and punished it as a misdemeanour with one year's imprisonment. This decision, however, would be inconsistent under the law as laid down by the Penal Code; but for a more detailed discussion of this point, see the notes on Rape.

Sect. 84. *Act of a person of unsound mind.*—**Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.**

Notes.

The English law as to what constitutes a sufficient defence of insanity was laid down in *Reg.* v. *M'Naughten*, 10 *Cl. and Fin.* 200. "The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course,

we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

The principles laid down in *M'Naughten's case* have been acted on in various other cases which it will be well to illustrate here. In *Rex* v. *Offord*, 5 *C. and P.* 168, Lord *Lyndhurst* held that to justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong: and that, at the time of committing the act, he did not consider it was an offence against the laws of God and nature. So, again, in *Reg.* v. *Higginson*, 1 *C. and K.* 129. *Maule*, J., held that, to entitle a person to be acquitted on the ground of insanity, he must, at the time of the committing the offence, have been so insane that he did not know right from wrong. In *Reg.* v. *Townley*, 3 *F. and F.* 839, *Martin*, B., said that the question for the jury was, "Did the prisoner do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder." In *Reg.* v. *Oxford*, 9 *C. and P.* 525, three judges, Lord *Denman*, C. J., *Alderson*, B., and *Patteson*, J., held that, if in answer to an indictment for treason, for attempting the life of the sovereign by shooting at her Majesty, the defence is insanity, the question for the jury will be, whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was really unconscious at the time he was committing the act that it was a crime. In *Reg.* v. *Burton*, 3 *F. and F.* 772, *Wightman*, J., explained to the jury that the delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions or impressions of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still not destroyed although it may be perverted; and the

theory of moral insanity or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject. A mere uncontrollable impulse of the mind, co-existing with the full possession of the faculties, will not warrant an acquittal on the ground of insanity, if at the time the prisoner committed the act he knew that what he was doing was wrong; *Bramwell*, B., in *Reg.* v. *Haynes*, 1 *F. and F.* 666; and *Parke*, B., in *Reg.* v. *Barton*, 3 *Cox C. C.* 275.

If a person labours under an insane delusion as to an existing state of facts, "we think he must be considered in the same state as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment"; *Reg.* v. *M'Naughten*, *ubi sup.* On a trial for murder, the defence of insanity by the evidence showing a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of *delirium tremens*, the prisoner, however, not having been labouring under the effects of such a fit at the time of the act, and the circumstances showing sense and deliberation, and a perfect understanding of the nature of the act; it was held by *Erle*, C. J., that the evidence was not sufficient to support the defence, as it rather tended to show wilful excesses and extreme folly, than mental incapacity; *Reg.* v. *Leigh*, 4 *F. and F.* 915. Where a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was done during such a fit, even although there is nothing before or after the act to indicate it, and though there is some evidence of design and malice; *Reg.* v. *Richards*, 1 *F. and F.* 87. A married woman having killed her husband immediately after an apparent recovery from a disease (the result of child-birth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus weakened its power and tended to produce insane delusions of the senses, which while suffering under such disease, she had

complained of, and which by her own account had been renewed at the time of the act of homicide (although they were not such as would lead to it); it was held by *Erle*, C. J., that this was evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it; *Reg.* v. *Law*, 2 *F. and F.* 836. So, too, where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design; but it appeared that there was insanity in her family; and from her demeanour before and after the act, which, although not wholly irrational, yet was strangely erratic and excited—and from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations—the medical men were of opinion that she was labouring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act; this was left by *Wightman*, J., to the jury as evidence on which they might rightly find her not guilty on the ground of insanity; *Reg.* v. *Vyse*, 3 *F. and F.* 247. Where a man, who is suffering from fever which causes him while suffering from its paroxysms to be bewildered and unconscious, commits murder, but not while delirious, and there is no evidence to show that he was not conscious of the nature of his act, he cannot be acquitted under this section; *Emp.* v. *Laksman*, *I. L. R.* 10 *Bom.* 512. On an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill-will in the prisoner towards the owner; and in order to justify a jury in acquitting a person on the ground of insanity, they must believe that he did not know right from wrong; but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person, this will amount to a general verdict of not guilty; *per Crompton*, J., in *Reg.* v. *Davies*, 1 *F. and F.* 69.

When the defence of insanity is set up, in order to warrant the jury in acquitting the prisoner, it must be proved affirmatively that he is insane; if that fact be left in doubt, and the commission of the crime charged in the indictment is proved, it is their duty to convict; *per Rolfe*, B., in *Reg.* v. *Stokes*, 3 *C. and K.* 185. So, too, in *Reg.* v. *Layton*, 4 *Cox C. C.* 149, the same learned

judge ruled that, where a prisoner sets up insanity as a ground of defence, one cardinal rule is, that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury is, not whether the prisoner was of sound mind, but whether he has made out to their satisfaction that he was not of sound mind. The jury may come to a conclusion on this point from the conduct and acts of the accused shortly before and down to the commission of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and on another subject. The want, too, of motive for the commission of the crime and its being committed under circumstances which render detection inevitable, are important points for the consideration of the jury when coupled with the evidence of insanity on any particular point.

A party having been indicted for a misdemeanour, in uttering seditious words, and upon his arraignment refusing to plead, and showing symptoms of insanity, and an inquest being forthwith taken to try whether he was insane or not; it was held, first, that the jury might form their own judgment of the present state of the prisoner's mind from his demeanour while the inquest was being taken, and might thereupon find him to be insane, without any evidence being given as to his present state; and secondly, that, upon his showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses, or would offer any remarks on the evidence; *Reg.* v. *Goode*, 7 *A. and E.* 536.

A prisoner was indicted for shooting at his wife with intent to murder her, and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence

was an incorrect one, but, on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity; *Reg.* v. *Pearce*, 9 *C. and P.* 677.

Where a jury is empannelled to try whether a prisoner is insane or not at the time when he is brought up to plead to an indictment, the counsel for the prosecution is to begin and call his witnesses to prove the sanity of the prisoner; *Reg.* v. *Davis*, 6 *Cox C. C.* 326, 3 *C. and K.* 328. But where a jury is empannelled at the instance of the counsel for the prisoner, the proof of his insanity is incumbent on his counsel; *Reg.* v. *Turton*, 6 *Cox C. C.* 385.

A class of cases may occasionally arise which will cause some difficulty, that is, where a prisoner is both deaf and dumb. Where a person is deaf only, or dumb only, there is generally some means of causing intelligent communications to pass from the court to him, and from him to the court; but such is not always the case with a person who is both deaf and dumb. Two cases have occurred of this kind in modern practice in England; *Reg.* v. *Dyson*, 7 *C. and P.* 305, and *Reg.* v. *Pritchard*, *ib.* 303. In the latter case, Alderson, B., laid down the law to the jury in the following terms: "There are three points to be inquired into: first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he might challenge any one of you to whom he may object, and to comprehend the details of the evidence which, in a case of this nature, must constitute a minute investigation. Upon this issue if you think there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters." In both the foregoing cases the jury found that the prisoner was not of sound mind, and the judge ordered the prisoner to be detained under 39 and 40 Geo. III. c. 94, s. 2. Treating such cases as cases of insanity, provision is made for them by the Criminal Procedure Code.

Sect. 85. *Act of a person incapable of judgment by reason of intoxication.*—**Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.**

Sect. 86. *Offence requiring a particular intent committed by one who is intoxicated.*—**In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.**

Notes.

By the English law drunkenness is not any excuse for crime; *Pearson's Case*, 2 *Lewin, C. C.* 144. Still, by the practice of the courts in England, it is constantly held that a person who is intoxicated may be incapable of having any intention, and thus the nature of an offence may be considerably reduced, though intoxication does not render him entirely dispunishable for the act he may have committed while under the influence of liquor. Thus in a case of stabbing, where the prisoner used a deadly weapon, the fact that he was drunk does not at all alter the nature of the case; but if he had intemperately used an instrument not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time; per *Alderson*, B., in *Rex* v. *Meakin*, 7 *C. and P.* 297. Again, *Parke*, B., says that if a man is drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question whether he was

excited by passion or acted from malice; as, also, it may be on the question whether expressions used by the prisoner manifested a deliberate purpose, or were the idle expressions of a drunken man; *Rex* v. *Thomas*, 7 *C. and P.* 817. In a third case, *Crowder*, J., laid it down that though drunkenness is no excuse for crime, it may be taken into account by the jury when considering the motive or intent of a person acting under its influence; *Reg.* v. *Gamlen*, 1 *F. and F.* 90. Where, on a trial of an indictment for an attempt to commit suicide, it appeared that the prisoner was, at the time of the commission of the alleged offence, so drunk that she did not know what she was doing, it was held that this negatived the intent to commit suicide; *Reg.* v. *Moore*, 3 *C. and K.* 319; 16 *Jur.* 750.

This being the English law, how far do these sections alter it? The 85th is really an enunciation of the general principle, that drunkenness is no excuse for crime; with the further enunciation, that if a person is forcibly, against his will, put in a position in which he has no control over his actions, he is not responsible for them. The 86th section then provides that a drunken man committing an offence shall be assumed to have the same knowledge and intention as he would have had if sober; it makes a man who gets intoxicated his own insurer against the possible results of his drunkenness. If the law infers a certain knowledge or intention in a man who does certain acts when he is sober, the same knowledge and intention will be attributed to a drunken man who does those acts. Thus a man who stabs another with a dagger, or shoots him with a pistol, is presumed in law to intend to kill him, whether the accused be drunk or sober; and under this section, although drunkenness does not excuse, it does not aggravate an offence; *Reg.* v. *Zulfukar Khan*, 8 *B. L. R. App.* 21, and 16 *W. R. Cr.* 36. In a case, however, of murder committed in a drunken squabble, voluntary drunkenness, though it does not palliate the offence, may be taken into account as throwing some light on the question of intention; *Reg.* v. *Ram Sahoy Bhar*, *W. R.* 1864, *Cr.* 24. And where an act may be innocent or may be guilty, as, for instance, the passing of a forged note, the law does not attribute any greater knowledge or intention to a drunken than to a sober man; and the prosecution must prove the intent

by surrounding circumstances, as in ordinary cases, and the court or jury may take the fact of the accused having been drunk at the time he committed the act into account in forming a conclusion upon his innocence or guilt. The same remark would apply to acts, the heinousness of which would differ according to the intention with which they were done. So in a case similar to that of *Reg.* v. *Moore*, *supra*, it might be a question whether the act alleged was an attempt at suicide, or whether it was not even an act of the prisoner, but an accident or misadventure arising from her having been utterly incapable of taking care of herself.

Sect. 87. *Act not intended to cause Death, &c., done by consent.* **—Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age who has given consent, whether expressed or implied, to suffer that harm: or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.**

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Notes.

Grievous hurt is by Sect. 320 limited to the following kinds:— Emasculation; permanent privation of the sight of either eye, of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days,

in severe bodily pain, or unable to follow his ordinary pursuits: and by the joint operation of Sects. 321 and 322, a person is said voluntarily to cause grievous hurt who does any act with the intention of thereby causing grievous hurt to any person, or *with the knowledge that he is likely thereby to cause grievous hurt* to any person, and does thereby cause grievous hurt to any person. Therefore, it will appear that this section is practically in accord with the English law as respects games and pastimes. In both cases the probability of grievous hurt being caused seems to have been the practical limit.

A tilt or tournament, although the martial diversion of our ancestors, was nevertheless an unlawful act; see *Reg.* v. *Coney*, 8 *Q. B. D.* 549; and so are prize-fighting and sword-playing, the succeeding amusements of their posterity from time to time; *Reg.* v. *Brown, Car. and M.* 314. And the unlawfulness extends to all persons assembled for the purpose of aiding and abetting those sports; *Reg.* v. *Perkins*, 4 *C. and P.* 537; *Reg.* v. *Hargrave*, 5 *C. and P.* 170; *Reg.* v. *Murphy*, 6 *C. and P.* 103. Therefore, if a knight in the former case, or a gladiator or boxer in the latter, be killed, such killing is manslaughter; 4 *Bl. Com.* 183. It is scarcely possible to suppose that a prize-fight would be allowed by the provisions of this section, on the ground of want of probability that the fight would cause either death or grievous hurt; for does not experience teach the probability of permanent disfiguration of the head or face, of a fracture or dislocation of a bone or tooth, of severe bodily pain or inability to follow one's ordinary occupation for the space of twenty days? If so, then prize-fighting does not come within the exception allowed by this section, and is not justifiable, independently of any prohibition which might arise from other terms of Sect. 91, in consequence of a prize-fight involving a breach of the peace. Fencing with naked swords is forbidden, but with foils is allowable so long as the buttons are at the end of the foils; boxing with gloves is also allowable, and many other pastimes, of which in the ordinary course of affairs it is not likely that death or grievous hurt will be the result. Therefore, in England it is a good defence to prove that a battery was merely an amicable contest—as, that one wrestled with another for a wager; *Com. Dig. Pleader*, 3 *M.* 18. So, also, that it happened by accident whilst the defend-

ant was engaged in some sport or game, which was neither unlawful nor dangerous, is a good defence. In the case of *Reg.* v. *Coney*, 8 *Q. B. D.* 539, *Cave*, J., says:—"A blow struck in anger, or which is likely, or intended, to cause corporal hurt, is an assault, but a blow struck in sport, and not likely, nor intended, to cause bodily harm, is not an assault, and an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault, but playing with single sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg.* v. *Orton*, 30 *L. T.* 293."

The consent given, it should be observed, must be of a person above eighteen years of age, and therefore, by the terms of the section, there is no permission for any game in which there is any degree of danger between persons under that age. Therefore two boys of sixteen fencing with foils or single sticks, or boxing with gloves, would not by it be protected. Further, the consent given being to take a certain kind of risk, the amount of risk must not be increased, nor the kind thereof changed; and this involves the necessity that both parties should strictly observe all the rules of the game or pastime in which they are engaged, though, of course, it is quite competent to either party in the course of the game to take upon himself a greater amount of risk than he agreed to at first. And to this effect it is ruled in *East's 'Pleas of the Crown,' vol.* i. *p.* 269: "In cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms; for if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would cause such act to amount to manslaughter, but not murder, because the intent was not malicious." The other questions connected with consent will be discussed under Sect. 90.

Sect. 88. *Act not intended to cause Death, done by consent in good faith for the benefit of a person.*—**Nothing which is not intended to cause death is an offence by reason of any harm**

which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether expressed or implied, to suffer that harm, or to take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending in good faith Z's benefit, performs that operation on Z with Z's consent. A has committed no offence.

Sect. 89. *Act done in good faith for the benefit of a Child, &c., by or by consent of Guardian.*—Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either expressed or implied, of the guardian, or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person: Provided—

First, That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly, That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly, That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly, **That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.**

Illustration.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as the object was the cure of the child.

Notes.

Sect. 92 ought to follow these two sections in the Code, because it applies to the same acts as enunciated here, when those acts are done without the patient's consent, when the circumstances are such that it is impossible for him to signify his consent, or if he is incapable of giving consent and has no guardian or other person in lawful charge of him, from whom it is possible to obtain consent in time for the thing to be done with benefit. The remarks and illustrations to these two sections will therefore equally apply to Sect. 92, and will not be repeated there.

First, it will be necessary to import the explanation attached to Sect. 92, which is, that "mere pecuniary benefit is not benefit within the meaning of Sects. 88, 89, and 92"; the benefit to accrue must be some physical benefit, the alleviation of some disease or diseased or disorganised condition of some part or member of the body. Therefore, if a man desiring to enter a society of eunuchs induces another to castrate him, the operator is liable for the consequences of the emasculation; and it has been held in the case of *Reg.* v. *Baboolun Hijrah*, 5 *W. R. Crim.* 7, that where a man of full age (over eighteen years) voluntarily submits himself, for the cure of no diseased state, to emasculation, performed neither by a skilful hand nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide, although not only did they not know that emasculation was unlawful, but believed a man might cause

himself to be emasculated if he pleased. Mr. Mayne relates "a strange case, in which a man who had a life estate in himself entailed upon his children, with reversion to himself in fee, wanted to raise a loan upon the security of his estate. He had no children; but as it was possible he might have issue, the security was rejected. He hit upon the strange idea of having himself castrated in order to make possibility of issue extinct!" It need hardly be said that his legal advisers did not sanction this extraordinary device. In some parts of India, however, where eunuchs yet abound, the practice of emasculation of children, and even of adults, still exists for the purpose of obtaining the benefit (?) of admission to the caste, and out of such a desire arose the case just before quoted. But this kind of cases ought to diminish now that the class of persons by whom they are committed has been placed under special supervision.

The cases to which these exceptions really apply are those which are met with in medical practice, where dangerous operations are performed in the hope of benefiting the patient, or where life is jeopardised for the sake of saving life, and where pain is caused in the hope of relieving pain. Others may arise, but they are of such unfrequent occurrence that it is scarcely possible to discuss them profitably at any length; and in fact, after applying the principles which have been laid down under the English law as to the liability of medical practitioners, nearly all that can be said is that you must make the best of a bad job, and act for the best under the particular circumstances of each case.

The all-important part of these sections is the provision that whatever is done should be done in "good faith," that is, with "due care and attention," and due care and attention cannot be exercised without competent knowledge and skill; therefore, the principles on which these sections will be interpreted may be learnt from a study of the decisions on the liability of medical practioners for want of skill in the exercise of their profession. First, in civil actions, it has been ruled that every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, if he is an attorney, undertake, at all events, to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake

to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not; *per Tindal*, C. J., in *Lamphier* v. *Phipos*, 8 *C. and P.* 475. So *Erle*, C. J., in *Rich* v. *Pierpont*, 3 *F. and F.* 35, has ruled that to render a medical man liable for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed—nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. And in discussing the question of want of skill no distinction of any kind will be made between a duly qualified practitioner and one who practises without a legal qualification; see the cases of *Ruddock* v. *Lowe* 4 *F. and F.* 519; and *Jones* v. *Fay*, 4 *F. and F.* 525. Secondly, in criminal charges it has been held that any person, whether a licensed medical practitioner or not, who deals with the life or health of any of Her Majesty's subjects, is bound to have competent skill, and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter; *Rex* v. *Spiller*, 5 *C. and P.* 333; see also *Rex* v. *Simpson*, 1 *Lewin, C. C.* 172; and *Rex* v. *Ferguson*, 1 *Lewin, C. C.* 181; *Sukaroo* v. *Emp. I. L. R.* 14, *Calc.* 566. But if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person is a regular surgeon or not, or whether he has had a regular medical education or not; *Rex* v. *Van Butchell*, 3 *C. and P.* 629; see also the case of *Rex* v. *St. John Long*, 4 *C. and P.* 398, and *ib.* 423. If a medical man, though lawfully qualified as such, causes the death of a person by the grossly unskilful or the grossly incautious use of a dangerous instrument, he is guilty of manslaughter; *Reg.* v. *Spilling*, 2 *M. and Rob.* 107. So, too, where a person, grossly ignorant

of medicine, administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter; *Rex* v. *Webb*, 1 *M. and Rob.* 405; and 2 *Lavin, C. C.* 196; and the same doctrine has been laid down by *Willes*, J., in the case of *Reg.* v. *Markuss*, 4 *F. and F.* 356, where it was held that if an unskilled practitioner ventures to prescribe dangerous medicines, of the use of which he is ignorant, that is culpable rashness, for which he will be held liable. In three cases the law has been laid down a little less strictly than in those just referred to, though the general principle acted on has been the same. In the case of *Reg.* v. *Crook*, 1 *F. and F.* 521, and in that of *Reg.* v. *Crick*, *ib.* 519, it was held that the administration by an ignorant person of a dangerous medicine, in the one case corrosive sublimate, and in the other lobelia, was evidence on which the jury were to decide whether the prisoner had acted so rashly and carelessly as to cause death. In the former case, the prisoner, a blacksmith, applied the corrosive sublimate to a cancer, and thereby caused the death of the patient, and the accused was convicted of manslaughter: in the latter, a herb-doctor administered lobelia to a child, and the child got better; but the mother, observing this, continued the medicine without consulting the herb-doctor again, and the child died; but the accused was acquitted. The third case is that of *Rex.* v. *Williamson*, 3 *C. and P.* 635, where Lord *Ellenborough*, C. J., held that a person in the habit of acting as man-midwife, who tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by reason of which the patient died, cannot be convicted of manslaughter, unless the jury consider from the facts in evidence that he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention. In all these last three cases it will be observed that the acts causing the death were left to the jury as a piece of evidence from which they could infer ignorance or inattention or misconduct, but not as in themselves constituting legal negligence.

Sect. 90. *Consent known to be given under Fear, &c.*—**A consent is not such a consent as is intended by any section of the Code, if the consent is given by a person under fear of**

injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception. Or,

Consent of a Child or Person of Unsound Mind.—**If the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.**

Notes.

Under the former half of this section, the question arises as to what kind of injury it is the fear of which renders nugatory a consent given. Clearly, it must be a fear of an injury other than that which it is supposed will be the result if a proposed course of treatment is adopted, an injury other than that which may be the natural result of the state the patient is in. It must, in fact, be the consequence of a threat of injury to be *done*, external to and unconnected with the injury which may be *suffered*. So, too, although it is not so stated, it is surmised that there must be fear of injury to the person, and not to property; for the consent to be given is apparently part of a contract, and, under the English law, an agreement made under duress of goods, or threat of damage, legal or actual, to goods, is not void; *Skeate* v. *Beale*, 11 *A. and E.* 983; *Wakefield* v. *Newton*, 6 *Q. B.* 276; *Kearns* v. *Durrell*, 6 *C. B.* 596, and 18 *L. J. N. S. C. P.* 28.

The interpretation of the words "misconception of fact" must be carefully undertaken; for it is evident from the sections which this controls that they cannot mean that the person consenting simply believes the facts to be different from what they really are, but that, by a *wilful misrepresentation*, he is made to believe the facts to be different from what the person representing them believes them to be, otherwise a medical man, honestly representing facts according to his skill and belief, might find himself charged as a criminal by reason of a mistake of judgment; and

the facts misrepresented must be in connection with the state of the patient and the action to be taken. Where a man consented to an operation which was dangerous, and the danger of which was unknown to him, but which he was led to believe would cure him, he cannot be said to have consented, so as to bring the case under Sect. 88; *Sukaroo* v. *Emp. I. L. R.* 14 *Calc.* 566. Further, the person about to act, in order to come within the terms of this section, must be aware at the time of acting that the consent was given under circumstances which nullify it.

For a case of consent given under the belief that snake charmers could heal those bitten by snakes, see *Reg.* v. *Punai Fattam*, 3 *Ben. L. R. A. Cr. J.* 25 and 12. *W. R. Cr.* 7.

The latter half of the section makes the Indian law different from the English. In England it is necessary in a case of rape there should be some evidence that the act was without the consent of the woman, *even where she is an idiot; Reg.* v. *Fletcher*, *L. R.* 1 *C. C.* 39, and the consent of a woman produced by mere animal instinct is sufficient to prevent a conviction for rape; *Reg.* v. *Fletcher*, *Bell C. C.* 63.

Sect. 91. *Acts which are Offences independently of Harm caused.*—**The exceptions in Sects. 87, 88, and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.**

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm;" and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Sect. 92. *Act done in Good Faith for the benefit of a Person without Consent.*—Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. Provided—

First, That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly, That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly, That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly, That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations.

(*a*) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger, knowing it to be likely that the shot may kill

Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(*d*) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of Sects. 88, 89, and 92.

Sect. 93. *Communication made in Good Faith.*—No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Sect. 94. *Act to which a Person is compelled by Threats.*—Except murder, and offences against the State punishable with death, nothing is an offence which is done by a

person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

Notes.

To obtain the benefit of this section, a prisoner must show that the act was done under fear of instant death; therefore, persons giving false evidence under the alleged influence of a threat are not protected by this section; *Reg.* v. *Sonoo*, 10 *W. R. Cr.* 48; *Reg.* v. *Gonowri*, 22 *W. R. Cr.* at p. 5.

Sect. 95. *Act causing Slight Harm.*—**Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.**

Notes.

The taking of almost valueless pods from a tree standing upon Government waste ground comes within this section, and so does not amount to theft; *Reg.* v. *Kasya bin Ravji*, 5 *Bom. H. C. R. C. C.* 35.

In a case where the accused, annoyed at the rejection of a petition presented by him, struck a District Superintendent of Police a blow across the chest with an umbrella, it was held that the pain caused was not of such a trivial character as to bring the case within this section; *In re Sheo Gholam Lalla.* 24 *W. R. Cr.* 67.

The tearing up by the accused of an account in his own handwriting and signed by him, showing advances made by the prosecutor to him, and payments made by him, and the balance due by him to the prosecutor, the accused having just made a payment to the prosecutor of a sum far short of the amount actually due, does not fall under this section; *Emp.* v. *Ramasami, I. L. R.* 12 *Mad.* 148.

OF THE RIGHT OF PRIVATE DEFENCE.

Sect. 96. *Nothing done in Private Defence is an Offence.*— **Nothing is an offence which is done in the exercise of the right of private defence.**

Sect. 97. *Right of Private Defence of the Body and of Property.*— **Every person has a right, subject to the restrictions contained in Sect. 99, to defend—**

First, **His own body, and the body of any other person, against any offence affecting the human body;**

Secondly, **The property, whether movable or immovable, of himself or of any other person, against an act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.**

Sect. 98. *Right of Private Defence against the Act of a Person of Unsound Mind, &c.*—**When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.**

Illustrations.

(*a*) **Z**, under the influence of madness, attempts to kill **A**; **Z** is guilty of no offence. But **A** has the same right of private defence which he would have if **Z** were sane.

(*b*) **A** enters by night a house which he is legally entitled to enter. **Z**, in good faith, taking **A** for a housebreaker, attacks **A**. Here **Z**, by attacking **A** under this misconception, commits no offence. But **A** has the same right of private defence against **Z**, which he would have if **Z** were not acting under that misconception.

Sect. 99. *Acts against which there is no Right of Private Defence.—First,* There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

Secondly, There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

Thirdly, There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Fourthly, Extent to which the Right may be exercised.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

Sect. 100. *When Right of Defence of Body extends to causing Death.*—The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

First, Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly, Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault.

Thirdly, An assault with the intention of committing rape.

Fourthly, An assault with the intention of gratifying unnatural lust.

Fifthly, An assault with the intention of kidnapping or abducting.

Sixthly, An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Sect. 101. *When such Right extends to causing any harm other than Death.*—If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restriction mentioned in Sect. 99, to the voluntary causing to the assailant of any harm other than death.

Sect. 102. *Commencement, &c., of the Right.*—The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

Sect. 103. *When the Right of Private Defence of Property extends to causing Death.*—The right of private defence of property extends, under the restrictions mentioned in Sect. 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:—

First, Robbery.

Secondly, Housebreaking by night.

Thirdly, Mischief by fire committed on any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly, Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Sect. 104. *When such Right extends to causing any harm other than Death.*—If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Sect. 99, to the voluntary causing to the wrong-doer of any harm other than death.

Sect. 105. *Commencement, &c., of Right.—First*, The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Secondly, The right of private defence of property against theft continues till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.

Thirdly, The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

Fourthly, The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

Fifthly, The right of private defence of property against housebreaking by night continues as long as the house-trespass which has been begun by such housebreaking continues.

Sect. 106. *Right of Private Defence when there is risk of harm to an Innocent Person.*—**If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.**

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children, who are mingled with the mob. A commits no offence, if, by so firing, he harms any of the children.

Notes.

The right of private defence authorizes a man to defend his own body or the body of any other person against any offence affecting the human body, and his own or any one else's property against any act which falls under the definition of theft, robbery, mischief or criminal trespass, or which would constitute an attempt to commit any of these offences, even though, through some legal disability, or misconception of fact in the person against whom the right is exercised, that person may not by his act have committed any offence punishable under the Code; but there is no right of private defence *under the Penal Code* against any act which is not *in itself* an offence under the Code; *Ganouri* v. *Emp. I. L. R.* 16 *Calc. p.* 218. The right given by Sects. 96-98 and 100-106 is, however, controlled by Sect 99; *Reg.* v. *Dhununjai Poly*, 14 *W. R. Cr.* 68. There is no right of self-defence against any act *which does not cause the apprehension of death or grievous hurt*, if the act be done or attempted to be done *by, or under the direction of, a public servant*, acting in good faith under the colour of his office,

although the act may not be strictly justified by law, if the person desiring to exercise the right knows that the person doing the act is, or is acting under the direction of, a public servant. In the latter case, however, the fact of the person having authority must be communicated, or, if in writing, shewn.

The first and second paragraphs of this section do not apply to cases where the act done or the order given is entirely *ultra vires; Emp.* v. *Tulsiram. I. L. R.* 13 *Bom. p.* 171.

If a constable illegally arrests a person, that person may legally struggle to free himself and his property from arrest, but he is not justified in voluntarily causing hurt to the constable for that purpose; *Bharoo.* v. *Mulji, I. L. R.* 13 *Bom. p.* 171.

An officer, subordinate to an officer in charge of a police station, who was deputed by the latter to make an inquiry under Sect. 135 of the old Criminal Procedure Code, attempted, without a search-warrant, to enter a house in search of property alleged to have been stolen, and was obstructed and resisted. It was held that, even though the police officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification to his obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice; and he was therefore within the exception contained in the first clause of Sect. 99; *Reg.* v. *Vyankatrav Shrinivas, 7 Bom. H. C. Rep. C. C.* 50. So, too, where an officer arrested a man under a warrant for his arrest which was only initialled by the officer issuing it; *Emp.* v. *Janki Prasad, I. L. R.* 8 *All.* 293. There is, also, no right of private defence in case where there is time to have recourse to the public authorities for protection. Where the servants of an indigo factory in Bengal, who had a right to sow land, but had been interfered with by the villagers, went out in force armed with deadly weapons in order to effect their purpose, and the villagers also went out armed to meet them; it was held that, in the affray which followed, neither party could plead the right of private defence of property, as there was a police station near at hand, and each party could have applied for the protection of the law; *Reg.* v. *Jeolall, 7 W. R. Cr.* 34.

Further, no greater harm must be inflicted in the exercise of the right of self-defence than is absolutely necessary for the defence of the person using it; *Reg.* v. *Dhunnjai Poly*, 14. *W. R. Cr.* 68.

Under Sect. 100 it has been decided that the right of private defence of the body and property is not exceeded by a person who, when attacked by another with a spear, strikes a blow with a *lattee;* and such right extends to the taking of life where grievous hurt is reasonably apprehended; *Reg.* v. *Moizudin*, 11 *W. R. Cr.* 11; *Reg.* v. *Ram Lall Sing*, 22 *W. R. Cr.* 50.

In a case under Sect. 102 the following facts appeared in evidence: The accused and the deceased, with a third person, met one day at a liquor-shop; and there drank together. They afterwards walked together, the third person being just behind the other two. Whilst so walking together, an altercation took place in respect of the deceased having, as alleged by the prisoner, caused the death of the prisoner's four children by incantations. According to the prisoner's account the deceased admitted that he had done so, and added that he would also bring about the death of the prisoner; in short, that he would not allow him to leave the jungle alive, but would cause him to be taken and eaten by a tiger. Thereupon the prisoner stated that he killed the deceased with several blows of a heavy *lattee.* It was held, with reference to the provisions of Sects. 97, 99, and 102, that the accused had no reasonable apprehension of danger to himself from the threats of the deceased, whom he killed; and that, therefore, the right of private defence of the body did not arise, and the case was not taken out of the category of murder by reason of the second exception to Sect. 300; *Reg.* v. *Gobadur Bhooyan*, 13 *W. R. Cr.* 55.

Under Sects. 103 and 104, it has been ruled that a party in possession of land is legally entitled to defend his possession against another person seeking to eject him by force; *Reg.* v. *Tulsi Sing*, 2 *Ben. L. R. A. Cr. J.* 16, and 10 *W. R. Cr.* 64. The prisoners in another case, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crops, and when they had no time to complain to the police, inflicted a wound upon one of the other party with a bamboo, from effects of

which the man afterwards died, and were convicted by the Sessions Judge under Sects. 148 and 304; but the High Court held that the force used and the injuries inflicted were not such as to exceed the right of private defence of property, and directed an acquittal; *Reg.* v. *Guru Churn Chung*, 6 *Ben. L. R. App.* 9, and 14 *W. R. Cr.* 69; see also *Reg.* v. *Mitto*, 3. *W. R. Cr.* 69; *Reg.* v. *Sachee*, 7 *ib.* 112; *Reg.* v. *Raj Kisto*, 12 *ib.* 43; *Reg.* v. *Ram Lall*, 22 *ib.* 51. Where the accused, whose property had frequently been stolen, went, armed with a *lattee*, to watch his property, and with the *lattee* struck a thief, who died from the effects of the blow, it was held, having regard to the nature of the injuries inflicted, and the subsequent conduct of the accused, that the case did not fall within the 4th clause of Sect. 97, and that the prisoner was not guilty of culpable homicide, not amounting to murder, being protected by Sects. 97 and 104, he not having exceeded the legal right of private defence of property; *Reg.* v. *Mokee*, 12 *W. R. Cr.* 15; see also *Reg.* v. *Goberdhun Pari*, 14 *W. R. Cr.* 75. But where A trespassed on the lands of B, whose servants seized and confined A till the following morning, when B gave information to the police, it was held that the conduct of B and his servants in thus confining A could not be excused on the ground that they were exercising the right of private defence of property; *Shurufoodeen* v. *Kasinath*, 13 *W. R. Cr.* 65.

Where A trespassed into B's house, with the object of having intercourse with B's wife, and B and his friend C severely beat A., B was held justified under Sect. 104 and Sect. 96 in so acting, and C was also acquitted, as having aided in the commission of no offence; *Reg.* v. *Dhaumun Teli*, 20 *W. R. Cr.* 36.

Where the accused pursued a thief and killed him after the house-trespass ceased, it was held that the act did not fall under Exception 2 to Sect. 300, the right of private defence of property only continuing so long as the house-trespass continues; *Reg.* v. *Balakee Jolahed*, 10 *W. R. Cr.* 9; *Reg.* v. *Gour Chand*, 18 *W. R. Cr.* 29.

A head constable, making an enquiry into a case of house-breaking and theft, searched the tents of some gipsies for the stolen property, but did not find it. The gipsies then gave him a sum of

money, which he deemed insufficient and demanded more, which the gipsies refused to give. Thereupon he ordered one of the gipsies to be bound and taken away. While this was being done, the gipsies came up in a threatening manner, some of them being armed with sticks and stones, towards the place where the constable and gipsy were. Before any actual violence was done by the gipsies, and while they were still at a distance of five paces, the constable took up a gun and fired it, killing one of the gipsies. It was held that the constable had not a right of private defence against the gipsies, as their acts did not reasonably cause apprehension to him of death or grievous hurt, and, being caused by his illegal conduct, would have ceased if he had released the gipsy he had ordered to be bound; and that he was guilty of culpable homicide amounting to murder; *Emp.* v. *Abdul Hakim*, *I. L. R.* 3 *All.* 253.

Under English law, homicide may be justified, if committed *se defendendo*, or as it is sometimes termed of necessity; so also an assault may be justified if committed in defence of person or property. The text books mention one species of homicide said to be *se defendendo*, where the party slain is equally innocent as he who occasions his death, that of two persons who, having been shipwrecked, get on to the same plank, but finding it not able to save both of them, one thrusts the other from it and he is drowned, and it was said that such homicide is excusable through unavoidable necessity, and upon the principle of self-defence. In the case of *Reg.* v. *Dudley*, 14 *Q. B. D.* 273, this doctrine, and the authorities by which it was supposed to be supported, were examined, and no decided case was found to support it. The one real authority of former time was Lord Bacon in his commentary on the maxim "*necessitas inducit privilegium quoad jura privata*," in which he puts the case of the two men on the plank, which he is said to have derived from the canonists. *Coleridge*, C. J., commenting on this, says at p. 286:—"If Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. Consequently, a man who, in order to escape death by starvation, kills another for the purpose of eating his flesh, is guilty of murder;

although at the time of the act he is in such circumstances that he believes, and has reasonable groumd for believing, that it affords the only chance of preserving his life, and that the person slain would be likely to die very shortly of inanition." The Penal Code excuses no such act as this, and the only case in which the Code would reduce the punishment is, perhaps, in the case of the person slain consenting to have his life taken for the benefit of the survivors.

CHAPTER V.

ABETMENT.

Sect. 107. *Abetment of a thing.*—A person abets the doing of a thing, who—

First, Instigates any person to do that thing; or,

Secondly, Engages with one or more persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly, Intentionally aids, by an act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration.

A, a public officer, is authorised by a warrant from a court of justice to apprehend Z. B, knowing that fact, and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigating the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Sect. 108. *Abettor.*—A person abets an offence who abets either the commission of an offence, or the commission

of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(*a*) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(*b*) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge.

Illustrations.

(*a*) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(*b*) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act, and thereby causes Z's death. Here, though B was not

capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(*c*) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(*d*) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with

the punishment of murder; and as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—**It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.**

Illustration.

A concerts with B a plan of poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section, and is liable to the punishment for murder.

ABETMENT GENERALLY.

Evidence.

By English law, where two or more persons are to be brought to justice for one and the same felony, they are considered in the light either—(1) of principals in the first degree; (2) of principals in the second degree; (3) of accessories before the fact; (4) of accessories after the fact. The general definition of a *principal in the first degree* is, one who is the actor or actual perpetrator of the fact; 1 *Hale*, 233, 615. *Principals in the second degree* are those who are present, aiding and abetting, at the commission of the fact, but the presence may be either actual or constructive. A person

watching outside a house to prevent surprise, while his companions are in the house committing a felony, is as much present in law as if he were actually inside the house; but he must be sufficiently near to give assistance; *Reg.* v. *Stewart, R. and R.* 363. *Accessories before the fact* are those who, being absent at the time of the felony committed, do yet procure, counsel, command or abet another to commit a felony; 1 *Hale*, 615; and it is essential that the party should not be present at the time the offence is committed. *Accessories after the fact* are those who, knowing a felony to have been committed, relieve, comfort or assist the felon, in order to hinder his apprehension, trial or punishment; 1 *Hale*, 618; *Dalt.* 530.

Under the Penal Code, there are practically the same classes of offences but the nomenclature is different. There are principals; abettors who are present at the commission of the offence, punishable under Sect. 114 as principals; abettors who are not present at the commission of the offence; and those who harbour or conceal an offender, which are punishable under Sects. 212, 213 and 216.

Abetment under the Code may be by *instigating* a person to commit an offence; by *engaging in a conspiracy* to commit it; or by *intentionally aiding* him to commit it; but in the proof of abetment care must be taken to discriminate between acts which are innocent, although at first suspicious, and those which are criminal. It is absolutely necessary to shew that the alleged abettor is doing acts which necessarily lead up to, or aid in, the commission of the offence; *Reg.* v. *Nim Chand*, 20 *W. R. Cr.* at p. 44. In a case of abetment by instigation, every step must necessarily be criminal, because instigation presupposes that the instigator has made up his mind from the beginning that, if possible, the offence shall be committed. In abetment by conspiracy, the case is somewhat different, because the accused may have been in company of the other conspirators, may even have gone to the meeting at which the offence was resolved to be committed, but may have parted from the others before they had resolved to commit the offence. So, too, where the abetment is by *intentional aiding*, a man may have made a chisel for a burglar, or may have walked with him up to the door of the house into which he was going to break, but might have done either

act innocently, although both acts might rightly be looked upon as being very suspicious. Acts which are *merely* suspicious are not *proof* of abetment, but it must be shown that the accused knew and intended that the offence should be committed, and that the act in which he engaged actually assisted in starting, or aided in, the commission of the offence.

Abetment by instigation.—It must be proved that the accused instigated the commission of the offence, but it is immaterial whether the instigation be personal, or through the intervention of a third person, *Fost.* 125; *R.* v. *Earl of Somerset*, 19 *St. Tr.* 804. It may also be direct, by hire, counsel, command or conspiracy; or indirect, by evincing an express liking, approbation or assent to another's design of committing an offence; 2 *Hawk. c.* 29 *s.* 16. But a tacit acquiescence, or words which amount to a bare permission, will not be sufficient to prove abetment by instigation; 1 *Hale*, 616. There must be an active proceeding on the part of the accused, he must procure, incite, or in some other way encourage the act done by the principal. Therefore, where the accused acted as a stakeholder on the occasion of a prize fight which ended in the death of one of the fighters, but was not present at the fight, and took no other part in any of the proceedings connected with it, than to hold the stakes and hand them over to the winner, it was held that he could not be convicted as an accessory before the fact to the manslaughter; *R.* v. *Taylor*, *L. R.* 2 *C. C.* 147.

The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act actually done by the person whom he abets; *Reg.* v. *Imamdi Bhooyah*, 21 *W. R. Cr.* 8; and an accused may thus be convicted of abetting a much more serious offence than that of which the person abetted is convicted. And so is the law laid down in Sect. 110. It seems to me to be very doubtful, looking at Sects. 111 and 113 whether an abettor can abet a minor offence of the same character as that committed by the person abetted, as would seem to be the idea of the judges who decided the case of *Reg.* v. *Imamdi Bhooyah*, seeing that an abettor is liable for any act or effect which would naturally occur in the course of carrying out the course of action which he had abetted. Thus, if A command B

to beat C, and C dies of the beating, A is guilty of instigating the murder; 1 *Hale*, 617. So, too, if A command B to burn the house of C, and in so doing the house of D is also burnt, A would be guilty of abetting the burning of D's house; *R.* v. *Saunders*, *Plowd.* 475. So, also, if the offence commanded be committed by means different from those suggested, as for instance, if A commanded B to poison C, and B instead of poisoning C, shot him, A would nevertheless be guilty of instigating B to murder C; *Fost.* 369, 370.

In the case of *Reg.* v. *Pestanji Dinsha*, 10 *Bom. H. C. R.* 75, it was argued that the abetment of murder by sorcery or other impossible means is not an offence under the Penal Code. The question was left in doubt, the court finding it unnecessary to come to a decision on the point. Counsel for the Crown contended that abetment to murder by sorcery is an offence, because death may be caused indirectly by sorcery; and that, even if that be not so, intention to kill, followed by an overt act of instigation, constitutes an abetment of murder under Sect. 109 of the Indian Penal Code; and in such a case as that of A impressing B strongly with his desire for the death of C. and attempting to influence B to murder C by sorcery, and the murder thereon of C ensuing by the hand of B, through the agency of some possible means, it seems impossible, without a quibble, to hold that A is not guilty of having *instigated* the murder of C. C has been killed on account of A's inciting B to kill him; and B, in substituting possible means of death for the impossible means suggested by A, must have supposed, by inference, that though he thereby departed in some measure from the instructions given by A, still that so long as he followed out the main object, the murder of C, he was acting as the agent for carrying out C's expressed wish; see, too, Sect. 111. Upon an indictment on 43 Geo. III. c. 58, s. 2, *Lawrence*, J., said: "It is immaterial whether the shrub was savin or not, or whether it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge"; 3 *Camp. Rep.* 73, 76.

And if one man instigates another to commit a particular offence, and that other, in pursuance of such instigation, not only commits that offence, but in the course of it commits another in furtherance of it, the former is criminally responsible as abettor in respect of such last mentioned offence, if it is one which, having regard to the immediate object of the instigation, he must, as a reasonable man, have known would, in the ordinary course of events, probably have to be committed in order to carry out the original scheme; *Emp.* v. *Mathura Das, I. L. R.* 6 *All.* 491. Where, of several persons constituting an unlawful assembly, some only were armed with sticks, and A, one of them, was not so armed, but picked up a stick and used it, B the master of A, who had given a general order to beat, was held to be guilty of instigating the assault made by A; *Reg.* v. *Rassoo Koollah,* 12 *W. R. Cr.* 51.

But if the abettor order one offence, and the principal commit another, as, for instance, to burn a house, and instead of that he commits a theft, the accused will not be an abettor of the offence committed; 1 *Hale,* 617; *Sect.* 111, *Ill.* (*b*).

The instigation must be continuing; for, if the instigator of an offence repent, and before the offence is committed actually countermand it, and the principal notwithstanding commit it, the original instigator will not be liable as an abettor; 1 *Hale,* 618; *Reg.* v. *Ambita Govinda,* 10 *Bom. H. C. Rep.* 497.

Abetment by conspiracy.—In order to constitute a conspiracy there must be at least two persons, but it is not necessary that the names of any but the accused should be known, or even that their persons should be capable of identification. In England a person can be charged with conspiring with certain persons whose names are to the jurors unknown, but evidence must always be given to show that there were other persons engaged with him in the conspiracy. It is not necessary that the accused should concert the offence with the person who actually commits it. It is sufficient that he engages in a conspiracy, in pursuance of which the offence is committed; *Reg.* v. *Gobind Dobey,* 21, *W. R. Cr.* 35. It must also be shewn that the accused continued engaged in the conspiracy down to the time when the offence was committed; *Reg.* v. *Ambita Govind,* 10 *Bom. H. C. Rep.* 497; or,

at any rate, until the very last stage when the final resolution was taken in the matter, and the act put in the course of actual execution.

Abetment by intentionally aiding.—In this case the aid must be given in the doing of the thing which is an offence, but the assistance may be given directly at the time the act is done, or it may be by doing something either before or at the time of the commission of the offence which facilitates its commission. Consequently the aider must not be actually or constructively present at the commission of the offence, as is the case with an aider and abettor under English law, and in fact to constitute a simple case of abetment by aiding the aider should not be present, because if present at the commission of the offence he is, by Sect. 114, to be deemed to have committed the offence. The facilitating of the commission of the offence may be either by commission or omission, but it must be shewn that the omission was intentional, and with the intent to aid the commission of the offence; *Noorul Hoossein* v. *Fabre-Tonnerre*, 24 *W. R. Cr.* 26; and the omission must involve a breach of a legal obligation; *Reg.* v. *Khadim*, 4 *Ben. L. R. A. Cr.* 7. A head constable, knowing that certain persons are likely to be tortured, and keeping out of the way, is guilty of abetment; *Reg.* v. *Kali Churn Gangooly*, 21 *W. R. Cr.* 11.

The mere fact that the offence of extortion was committed in the presence of the village chowkidar without eliciting any disapproval on his part will not render him liable as an abettor *In re Gopal Chunder*, *I. L. R.* 8 *Calc.* 728. To be present and aware that an offence is about to be committed, does not constitute abetment, unless the person there present holds some position of rank and influence such that his presence is a direct encouragement of the offenders, or unless some specific duty of prevention rests upon him which he leaves unfulfilled in such a way as to afford ground for the inference that he has joined in a conspiracy for the perpetration of the offence; *Emp.* v. *Lakshmi*, *B. R.* 19*th August* 1886.

A prisoner, who consented to form one of a party who subsequently committed a theft, withdrew from his agreement, but was nevertheless present at the time the theft was committed,

does not conspire within cl. 2 of Sect. 107, but is guilty of intentionally aiding under cl. 3; *Reg.* v. *Boodhun Mooshur*, 8 *W. R. Cr.* 78.

A gave a dao to B, who had declared his intention of coercing C against whom he was acting. B inflicted grievous hurt on C with this dao. A was held guilty of abetment under Explanation 2 of Sect. 107; *Reg.* v. *Eshan Meah*, 12 *W. R. Cr.* 52.

A priest who knowingly celebrates a bigamous marriage commits the offence of abetment of bigamy; *Emp.* v. *Umi*, *I. L. R.* 5 *Bom.* 126; but the mere consent of persons to be present at such a marriage; or their presence in consequence of such consent; or the grant of accommodation in a house for such a marriage, does not necessarily constitute abetment of such marriage; *ib.*

A Mahomedan guardian of a married female infant who, while her husband is living, causes a marriage ceremony to be gone through in her name, but in her absence and without her consent, with another man, does not commit offence of abetting the commission of an offence under Sect. 494. No principal offence having been committed, there was no offence which could be abetted; *Emp.* v. *Abdool Curreem*, *I. L. R.* 4 *Calc.* 10.

The supplying of food to a person about to commit an offence is not an abetment of that offence, unless it was supplied in order to facilitate the commission of the offence, *e.g.*, to enable the offender to go on a journey to the scene of the offence, or to enable him to conceal himself while he sought for an opportunity; *In re Lingam Ramnama*, *I. L. R.* 2 *Mad.* 137.

A debtor, having paid a sum of money to his creditor, who had not at hand a receipt stamp, accepted from him an unstamped receipt, promising to affix a stamp thereto; it was held that this did not constitute abetment of the offence of giving an unstamped receipt; *Emp.* v. *Witthulal*, *I. L. R.* 8 *All.* 18; *Emp.* v. *Janki*, *I. L. R.* 7. *Bom.* 82.

By Sect. 40, as amended by Act XXVII. of 1870, the word "offence" in Sects. 109, 110, 112, 114, 115, 116 and 117 denotes a thing punishable under the Penal Code, or under any special or local law, as defined by Sects. 41 and 42; consequently the abet-

ment of offences under special and local laws is punishable under these sections. Before the passing of 37 and 38 Vict. c. 27, there could be no abetment in India punishable under Sect. 109 of an offence committed on the high seas; *Reg.* v. *Elmstone*, 7 *Bom. H. C. Rep. C. C.* 89; but as that statute makes such offences punishable as if committed within the local jurisdiction, they are now punishable under the Penal Code, and an abetment in India of such offence would also be punishable under the Code.

A foreign subject, resident in foreign territory, instigated in such territory the commission of murder, which murder was in consequence committed within British territory. It was held, that the instigation having taken place wholly in foreign territory, and not within any local jurisdiction created by the Code of Criminal Procedure, the instigator not belonging to any class made punishable by British Courts by a special law as contemplated by Sect. 3 of the Penal Code, was not amenable to a British Court; *Reg.* v. *Pirtal*, 10 *Bom. H. C. Rep.* 356.

Mere subsequent knowledge of an offence does not amount to evidence of abetment of that offence; *Reg.* v. *Shumeerudeen*, 2 *W. R. Cr.* 40. There can be no abetment of an offence after it has once been committed, and, therefore, mere proof that an accused person has given evidence in support of a false charge is no evidence that he abetted the institution of it; *In re Jugut Mohini Dassee*, 10 *C. L. R.* 4; *Reg.* v. *Ram Pandu*, 9 *B. L. R. App.* 16; *S. C. sub nom. Reg.* v. *Paun Pandah*, 18 *W. R. Cr.* 28.

To constitute the offence of abetment it is not necessary that the offence abetted should be committed; *In re Dinonath Burooa*, 18 *W. R. Cr.* 32; but to make it punishable under Sect. 109, the offence abetted must have been committed; *Reg.* v. *Rajcoomar Banerji*, 1 *Ind. Jur. O. S.* 105.

The offence of abetment under the Penal Code is a substantive offence. The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal; *Reg.* v. *Maruti Dada*, *I. L. R.* 1 *Bom.* 15.

On a charge of abetment of the abetment of an offence it is not necessary to prove that the principal offence was actually committed; *Emp.* v. *Troylukho Nath*, *I. L. R.* 4 *Calc.* 366.

Punishment of Abetment—Principal offence being committed.

Sect. 109. *Punishment of Abetment if the act abetted is committed.*—**Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for this offence.**

Explanation.—**An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.**

Illustrations.

(*a*) **A offers a bribe to B, a public servant, as a reward for shewing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Sect. 161.**

(*b*) **A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.**

(*c*) **A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.**

Offences under this chapter are triable by the court by which the offence abetted is triable. A warrant or summons should ordinarily issue in the first instance, according as a warrant or summons may

issue for the offence abetted. For offences coming under Sects. 115, 118, *and* 119 (*if the offence concealed be punishable with death or transportation for life*), *defendants are not bailable; for other offences defendants are bailable or not as the offence abetted is bailable or not.*

Charge.

Where Principal is charged in same indictment.—That you, the said A B, did, on or about the day of , at , abet the commission of the said offence of by the said C D, which was committed in consequence of the said abetment, and that you have thereby committed an offence punishable under Sects. 109 and of the Indian Penal Code, and within, &c.

Where Principal is not charged in the same indictment.—That one A B (*or* some person unknown) did, on the day of , at , commit , and that you, the said C D, at , abetted the said A B (*or* person unknown) in the commission of the said , which was committed in consequence of the said abetment, and that you have thereby committed an offence punishable under Sects. 109 and of the Indian Penal Code, and within, &c.

Evidence.

In order that an abettor may be punished under this section, it is necessary that it should be found distinctly, not only that the abetment was committed, but also that the principal offence was committed in consequence of such abetment, therefore the charge must contain an allegation of the latter fact. In like manner, if the abetment is to be brought under any of the subsequent sections which provide for the punishment of certain kinds of abetment, proper charges must be framed in the terms of those sections, and the numbers of those sections and of the sections imposing a punishment for the principal offence must be mentioned in the charge; 1 *W. R. Cr. Letters,* 9 ; 2 *W. R. C. L.* 1, 8.

In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Liability of Abettors under various circumstances.

Sect. 110. *Punishment of Abetment if the Person abetted does the act with a different intention from that of the Abettor.*—**Whoever**

abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Sect. 111. *Liability of Abettor when a different act is done.*—When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it; provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations.

(*a*) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner, and to the same extent, as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house, and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence to the burning.

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

Sect. 112. *Cumulative Punishment for act abetted and for act done.*—If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both offences; and if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

Sect. 113. *Liability of Abettor for an effect different from that intended.*—When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

Note.

In Sections 110 and 112 the word "offence" denotes anything punishable under the Penal Code or under any special or local law; *Sect.* 40.

Abettor present when offence committed.

Sect. 114. *Abettor present when offence is committed.*—**Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.**

Evidence.

This section simply provides for the punishment of what the English law calls principals in the second degree. A person present abetting an offence is to be *deemed* to have committed the offence, though he does not in fact do so any more than a principal in the second degree does. Hence "all who are present aiding and assisting a man to commit a rape are principal offenders in the second degree, whether they be men or women"; 1 *Russ.* 905; and hence Lord Audley (3 *Howell's State Trials*, 401) was convicted as a principal of a rape on his own wife, because he aided another to ravish her. There are several modes of abetment defined in the Penal Code. One is instigating another to commit an offence. If A instigates B to murder Z he commits abetment; if absent, he is punishable as an abettor, if the offence is committed, under Sect. 109; if present, he is by this section to be *deemed* to have committed the offence, and is punishable as a principal.

Another mode of abetment is by intentionally aiding, by any act or illegal omission, the doing of an offence. A aids B to murder Z. If absent, he is punishable as an abettor, and may be liable under Sect. 109; if present, then he is to be *deemed* as much to have committed the offence as if he had struck the fatal blow. The meaning of this section is, that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though, in point of fact, another actually committed it; 4 *Mad. H. C. Rulings, 8th March* 1869, xxxvii. If an abettor of an offence is, on account of his presence at its commission, to be charged under Sect. 114 as a principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence cannot be held to have been committed under his continuing abetment; *Reg.* v. *Amrita Govinda,* 10 *Bom. H. C. R.* 497. Where the court finds that parties came with a number of armed men and forcibly carried off a crop without the consent of the owner, even if such parties took no part in the actual carrying off, they must be considered as principals; *Reg.* v. *Shib Chunder Mundle,* 8 *W. R. Cr.* 59.

In framing a charge against an abettor who is present at the commission of the principal offence, he should be charged with having committed that offence; *Reg.* v. *Chima,* 8 *Bom. H. C. Rep. C. C.* 164; and in support of the charge it must be proved that the accused did such acts as to make himself liable as abettor if absent; and that he was actually present when the offence was committed; *Reg.* v. *Niruni,* 7 *W. R. Cr.* 49.

The word "offence" in this section denotes any thing punishable under the Penal Code or under any special or local law; *Sect.* 40.

Punishment for abetment—Principal offence not having been committed.

Sect. 115. *Abetment of an Offence punishable with Death or Transportation for Life where Offence is not committed.*—**Whoever abets the commission of an offence punishable with death or transportation for life shall, if that offence be not committed in consequence of the abetment, and no express**

provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if any act, for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration.

A instigates B to murder Z. The offence is not committed. If B had murdered Z he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years, and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

Sect. 116. *Abetment of an Offence punishable with Imprisonment where Offence is not committed. If the Abettor or the Person abetted be a Public Servant whose duty it is to prevent the Offence.* —Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provison is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence or with both; and if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence, the abettor shall be punished with impri-

sonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) A, a police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

For Court of Trial, issue of Summons or Warrant, and bail, see ante, p. 120.

Charge.

That you, the said A B, did, on or about the day of , at , abet the commission by one C D of an offence punishable by death, to wit: murder, which said offence was not committed in consequence of such abetment, and that you have thereby committed an offence punishable under Sect. 115 of the Indian Penal Code, and within, &c.

In the case of a charge under Sect. 116, *both that section, and the section under which the principal offence is punishable must be mentioned.*

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Abetment of an Offence by the Public, or by more than ten Persons.

Sect. 117. *Abetting the Commission of an Offence by the Public, or by more than ten Persons.*—**Whoever abets the commission of an offence by the public generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.**

Illustration.

A affixes in a public place a placard, instigating a sect, consisting of more than ten members, to meet at a certain time and place for the purpose of attacking the members of an adverse sect while engaged in a procession. A has committed the offence defined in this section.

For Court of Trial, issue of Summons or Warrant, and Bail, see ante, p. 120.

Charge.

That you, the said A B, did on or about the day of , at , abet the commission of an offence, to wit: the offence of rioting, by a number of persons exceeding ten, to wit: by affixing in the public streets of Bombay a placard instigating the Seedees to attack the Hindus while engaged in the Gunputti processions, and thereby committed an offence punishable under Sect. 117 of the Indian Penal Code, and within, &c.

Evidence.

This offence can be committed by one person, or by any number of persons. The first thing to be proved is the abetment of some offence as defined by Sect. 40, *ante, p.* 35. Then it must be proved, in the event of the abetment being by instigation or

conspiracy, that it was intended that the offence should be committed by the public generally, or by more than ten persons; and in the event of the abetment being by aiding, that it was actually committed or attempted to be committed by the public generally, or by more than ten persons.

The word "offence" in this section denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Concealment of designs to commit Offences.

Sect. 118. *Concealing a design to commit an Offence punishable with Death or Transportation for Life.*—**Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or transportation for life, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to fine.**

Illustration.

A knowing that dacoity is about to be committed at B, falsely informs the magistrate that dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B, in pursuance of the design. A is punishable under this section.

Sect. 119. *A Public Servant concealing a design to commit an Offence.*—**Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby**

facilitate the commission of an offence, the commission of which it is his duty as such public servant to prevent, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both; or if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years; or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Illustration.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of the offence. Here A has, by an illegal omission, concealed the existence of B's design, and is liable to punishment according to the provision of this section.

Sect. 120. *Concealing a design to commit an Offence punishable with Imprisonment.*—Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission,

the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Evidence.

In cases under Sects. 118, 119 and 120 it must be alleged in the charge and proved—1st, that there was an intended offence; 2ndly, that the intention to commit that offence was known to the accused, not merely suspected by him; 3rdly, that he *voluntarily* concealed the existence of such intention, and such concealment may be by an act on his part, or an *illegal* omission, or a false representation; 4thly, that the accused by his concealment of the design actually intended to facilitate the commission of the offence, or knew that he would be likely thereby to facilitate such commission. If it is desired that the higher punishment provided by these sections should be inflicted, it must be alleged and proved that the offence, the commission of which was concealed, was actually committed; but it is not necessary to prove that the concealment *actually facilitated* the commission of the offence. These sections all contemplate the concealment of a design by persons other than the accused to commit the offence charged; *Reg.* v. *Rajcoomar*, 1 *Ind. Jur. O. S.* 105. The concealment of an offence after it has been committed is not of itself an abetment; 5 *R. I. and P.* 106; though, coupled with other facts, it may be an important link in the chain of evidence, bringing home the offence of abetment to an accused person; and in some cases it may bring the person concealing the offence under the provisions of Sects. 202 and 203.

CHAPTER VI.

OFFENCES AGAINST THE STATE.

WAGING WAR.

Sect. 121. *Waging War, &c.*—**Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death or transportation for life, and shall forfeit all his property.**

Illustrations.

(*a*) **A joins an insurrection against the Queen. A has committed the offence defined in this section.**

(*b*) **A in India abets an insurrection against the Queen's Government in Ceylon, by sending arms to the insurgents. A is guilty of abetting the waging war against the Queen.**

Sect. 121A. *Conspiracy to commit Offences punishable by Sect.* **121.—Whoever within or without British India conspires to commit any of the offences punishable by Sect. 121, or to deprive the Queen of the sovereignty of British India or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years.**

Explanation.—**To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.**

Sect. 122. See p. 136.

Sect. 123. See p. 137.

Sect. 124. See p. 138.

Sect. 125. *Waging War against any Asiatic Power in Alliance with the Queen.*—**Whoever wages war against the Government of any Asiatic power in alliance or at peace with the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added; or with imprisonment of either description for a term which may extend to seven years, to which fine may be added; or with fine.**

Offences under Sects. 121, 121*A*, *and* 125, *are triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction must be obtained for the prosecution under Sect.* 196 *of the Criminal Procedure Code,* 1882.

Charge.

That you, on or about the day of , at waged war (*or* attempted to wage war, *or* abetted the waging of war) against the Queen (*or* against an Asiatic power, in alliance with, *or* at peace with the Queen); and that you have thereby committed an offence punishable under Sect. 121 (125) of the Indian Penal Code, and within, &c.

Evidence.

In order to support this charge, it is necessary to prove that which in law amounts to a waging of war, or an attempt to wage war, directly or constructively, against the Queen or against any Asiatic power in alliance or at peace with the Queen; and to prove that the person charged was either present and actually engaged in it, or was aiding and abetting it. The waging war intended by these sections is an offence of a narrower description than that called in England levying war. Levying war includes not only the actual disposition of an armed force, but also the collection and training of such force. Waging war evidently only refers to the actual carrying on of aggressive operations with or without actual fighting taking place. Waging war is nearly the same as what is called in English law direct levying of war.

The number of persons assembled is not material to constitute either a levying or a waging of war; three or four will constitute it as well as a thousand; 3 *Inst.* 9. It is not necessary that they should be armed with military weapons, or with colours flying; *Fost.* 208; nor is actual fighting necessary; *Fost.* 218; 1 *Hale*, 144; if substantial steps be taken towards that end, beyond the mere collection of a number of men or arms together, which is met by Sect. 122. But there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; *Reg.* v. *Frost*, 9 *C. and P.* 129; and not in furtherance of some private grievance.

War waged against a sovereign supposes an open rebellion against him for the purpose of deposing or imprisoning him, or of getting him into the power of the rebels, or of forcing him to put away his ministers, or of overturning his Government; 1 *Hale*, 152; *Fost* 210; and see *R.* v. *The Earls of Essex and Southampton*, 1 *St. Tr.* 197: and includes the holding or defending any of the sovereign's castles, forts, or ships against the sovereign or his forces, or delivering them up to rebels through treachery; 2 *Inst.* 10; *Fost.* 219; 1 *Hale* 525, 526. In case of war waged against a sovereign, all persons assembling and marching with rebels are guilty, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence or not; *R.* v. *The Earls of Essex and Southampton; Moore*, 621: unless compelled to join and continue with them *pro timore mortis*. But, under the Penal Code, this does not extend to the participating in crimes punishable with death. But if a person is not actively taking part in the main enterprise, but keeping himself in such a position as to be able to aid those who are, then such person is guilty of abetting the waging war against the Queen or sovereign of the country where the war is actually waged. In order to maintain the charge either of waging war or of abetting the waging war, proof must be given of a war actually waged, and not merely of a conspiracy to wage it; 1 *Hale*, 141-148; 1 *Hawk*, *c.* 57, *s.* 57. A conspiracy to wage war, however, is provided for by Sect. 121A.

The existence of a State as a separate power is a fact of which judicial notice will be taken by the courts of law, if such State has

been recognised by the sovereign power under which the courts are constituted. But if, upon a civil war in any country, one part of a nation should separate from the other, and establish for itself an independent government, the newly-formed nation cannot be recognised by the courts of law until it has been recognised by the sovereign. Still the judges are bound, *ex officio*, to know whether or not the Government has recognised such nation as an independent State; *Taylor on Evidence, Vol.* I., *p.* 3. If there should be any doubt on this point, the court should refer to its superior court, through which information will be obtained from that department of the Government within whose province the subject actually falls.

The rule of English statute law in regard to treason and misprision of treason is, that no person shall be indicted, tried, or attainted thereof but upon the oaths and testimony of two lawful witnesses. The repealed Evidence Act II. of 1855 recognised the English law on this subject, Sect. 28 (which provided that the direct evidence of one witness, entitled to full credit, should be sufficient for proof of any fact in any court), making an exception in cases of treason. But this exception no longer holds; for now, under Sect. 134 of the present Evidence Act I. of 1872, "No particular number of witnesses shall in any case be required for the proof of any fact." Under English statute law the two witnesses in cases of treason must testify, "either both to the same overt act, or one to one and the other to another overt act of the same treason, unless the accused shall openly, without violence, confess the same; and further, that if two or more distinct treasons, of divers heads or kinds, shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason." This protective rule, which in England has remained in its present state since the days of King William III., and in Ireland was adopted in the year 1821, has been incorporated, with some slight variation, into the constitution of America, and may be met with in the statutes of most, if not all, of the States of the Union. Any collateral matter not conducing to the proof of the overt acts of treason may be proved by a single witness, or by any other evidence admissible at common law, *e.g.*, that the prisoner is a subject of the British

Crown. The rule of the statute law, which requires two witnesess in a case of treason, does not in England apply to those treasons which consists in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming, or wounding of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty, or any attempt to injure in any manner whatsoever her royal person, or to the misprisions of any such treason; but in all these cases the accused shall be indicted, arraigned, tried, and attainted in the same manner, and according to the same course and order of trial, and upon the like evidence, as if he stood charged with murder; see 39 & 40 Geo. III. c. 93; 1 & 2 Geo. IV. c. 24; 5 & 6 Vict. c. 51.

The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war, against the Queen, under Sect. 121, are offences under the Penal Code only; and therefore (independently of any other reason) the provisions of 7 Will. III. c. 3, s. 5, which require charges of treason and misprision of treason to be brought within three years of the commission of the offence, do not apply; *Reg.* v. *Amiruddin*, 7 *Ben. L. R.* 63, and 15 *W. R. Cr.* 25.

Sect. 121A was inserted by Act XVII. of 1870, and by that Act Chaps. IV., V. and XXIII. of the Penal Code apply to offences punishable under this section.

COLLECTING ARMS, &c.

Sect. 122. *Collecting Arms, &c.*—**Whoever collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall forfeit all his property.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.* 1882.

Charge.

That he, on or about the day of , at , collected men (*or* arms, *or* ammunition) with the intention of waging war (*or* of being prepared to wage war), against the Queen, and that he has thereby committed an offence punishable under Sect. 122 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant actually collected men, arms, ammunition, or in any other way prepared to wage war, and that they were collected for the purpose of waging war or being prepared to wage war against the Queen, or were collected under such circumstances that the court or jury could infer that he so collected them for no other purpose.

CONCEALING DESIGN TO WAGE WAR.

Sect. 123. *Concealing a Design to Wage War.*—**Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.* 1882.

Charge.

That on or about the day of , at Poona, certain ill-disposed persons had conspired together to wage war against the the Queen, and were preparing to carry out their said design, and that you, well knowing of such design, concealed the existence of the same, intending by such concealment to facilitate (*or* knowing it to be likely that such concealment would facilitate) the waging of such war against the Queen, and that you have thereby committed an offence punishable under Sect. 123 of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of a design to wage war, that the defendant knew of such design, and that he concealed it either by one act, or by a series of acts, or by one illegal omission, or by a series of illegal omissions. The concealment will only be able to be proved inferentially, as, to prove it actually, it would be necessary to call every one to whom he ought to have made the design known, which would be in fact to call every official in the neighbourhood. The most usual case will be that of a conspiracy to wage war, in which case every one who takes an active part in the conspiracy will be guilty of an offence under this section. The intent with which the design was concealed must also be shown directly or inferentially.

ASSAULTING GOVERNOR-GENERAL, &c.

Sect. 124. *Assaulting Governor-General, &c.*—**Whoever, with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor, or Member of Council, assaults, or wrongfully restrains, or attempts wrongfully to restrain, or overawes by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*

Charge.

That you, on or about the day of , at , with the intention of inducing (*or* compelling) the Right Hon. A B, the Governor-General of India (*or* the Governor of the

Presidency, *or* the Lieutenant-Governor of , *or* the Hon. A B, a Member of the Council of the Governor-General of India, *or* of the Council of the Presidency) to exercise (*or* refrain from exercising) a lawful power as such , to wit: (*here insert description of power intended to be affected*) assaulted (*or* wrongfully restrained, *or* attempted wrongfully to restrain; *or* overawed by means of criminal force, *or* by the show of criminal force) such , and that you have thereby committed an offence punishable under Sect. 124 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant committed the assault on, or wrongfully restrained or attempted wrongfully to restrain, or overawed by means or by show of criminal force, some one of the persons named in the section. It will not be necessary to prove the appointment of such person, nor that he acted as such, for the Evidence Act provides that no fact of which the court will take judicial notice need be proved, and among the things of which the court is bound to take judicial notice, are the accession to office and the names and titles of persons filling any public office in British India, if the fact of their appointment has been notified in the *Gazette of India* or the local Gazette; *Sects.* 56, 57; but the fact that the person against whom the offence was committed was the person known under the name or title by which he is described in the charge must be proved. As to what is wrongful restraint, see Sect. 339, *post;* and for the definition of criminal force, see Sects. 349 and 350, *post.* Prove also by the words or acts of the defendant, or by the circumstances connected with the commission of the offence, the object with which it was committed.

EXCITING DISAFFECTION.

Sect. 124A. *Exciting Disaffection.*—**Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the government established by law in British India, shall be punished with transportation for life, or for any term, to which fine**

may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—**Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.**

Triable by the Court of Sesssion. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.* 1882.

This section was inserted by Act. XXVII. of 1870. Chaps. IV. and V. apply to offences under this section, but not Chap. XXIII.

Sect. 125. See p. 133.

COMMITTING DEPREDATION.

Sect. 126. *Committing Depredation on Territories of any friendly Power.*—**Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.* 1882.

Charge.

That you, on or about the day of , at , committed (*or* made preparations to commit) depredation on the territories of , a power in alliance (*or* at peace) with the Queen, and that you have thereby committed an offence punishable under Sect. 126 of the Indian Penal Code, and within, &c.

Evidence.

The proof of this offence will be very similiar to that of waging war against an Asiatic power in alliance or at peace with the Queen. In fact, it may be found that a person charged with that offence is really guilty of this, as an expedition which was apparently for the purpose of waging war may really be only for that of plunder. The power on whose territories the depredation is to be committed need not be an Asiatic power, as in the 125th section. There must be an entry of some kind, armed or otherwise, into the territories of a foreign friendly power during which depredation is committed, *or* there must be preparations made for the purpose of such an expedition.

RECEIVING PROPERTY ACQUIRED BY DEPREDATION.

Sect. 127. *Receiving Property acquired by Depredation.*— **Whoever receives any property, knowing the same to have been taken in the commission of any of the offences mentioned in Sects. 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and to forfeiture of the property so received.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. No sanction required.

Charge.

That you, on or about the day of , at , received a ring and a brooch ("any property"), knowing the same to have been taken in the commission of depredation on the territories of , a power in alliance (*or* at peace) with the Queen (*or* in waging war against , an Asiatic power in alliance *or* at peace with the Queen); and that you have thereby committed an offence punishable under Sect. 127 of the Indian Penal Code, and within, &c.

Evidence.

Prove the waging war, or the committing depredation, the receipt of the property, and the knowledge of the defendant. As to what constitutes receipt and knowledge, see the Chapter on the Receipt of Stolen Property, *post*, the remarks in which will also apply to this section. There is no definition of the word "property" in the Code, but it would seem as if by property was meant movable property, because the terms "take" and "receive" are hardly applicable to immovable property.

SUFFERING STATE PRISONER TO ESCAPE.

Sect. 128. *Voluntarily allowing Prisoner of State, &c., to escape.*—**Whoever, being a public servant, and having the custody of any State prisoner, or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

Sect. 129. *Negligently suffering Prisoner of State, &c., to escape.*—**Whoever, being a public servant, and having the custody of any State prisoner, or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.**

Offences under Sect. 128 *are triable by the Court of Session; those under Sect.* 129 *either by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable under Sect.* 128, *but bailable under Sect.* 129. *Not compoundable. Sanction required under Sect.* 196, *Cr. P. C.*, 1882.

Charge.

That you, being a public servant, to wit: (*here describe the office of the accused*), and as such having the custody of , a

State prisoner (*or* prisoner of war), on or about the day of , at , voluntarily allowed (*or* negligently suffered) such prisoner to escape from , the place in which such prisoner was confined; and that you have thereby committed an offence punishable under Sect. 128 (*or* 129) of the Indian Penal Code, and within, &c.

Evidence.

Prove that the accused acted as a public servant, and had the custody, in a place of confinement, of a State prisoner, or prisoner of war, and that such prisoner escaped. It must be proved also that such escape was through the voluntary act of the accused, or through his negligent default. It is not necessary to prove actual negligence, the law will imply it; see 1 *Hale*, 600; but if, in fact, the escape were not negligently suffered or voluntarily allowed, as if the prisoner by force rescued himself, or was rescued by others, and the defendant made fresh pursuit after him, but without effect; all this must be shown upon the part of the defendant. Also, it is immaterial whether the prisoner were guilty of such acts as would justify his detention as a State prisoner, provided the warrant or authority was such on the face of it as would justify the accused in detaining him.

See the explanation to the next section.

AIDING STATE PRISONER TO ESCAPE.

Sect. 130. *Aiding escape of and harbouring Prisoner.*—**Whoever knowingly aids or assists any State prisoner, or prisoner of war, in escaping from lawful custody, or offers or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

Explanation.—**A State prisoner or prisoner of war who is permitted to be at large on his parole within certain limits**

in British India is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.* 1882.

Charge.

That you, on or about the day of , at , knowingly aided (*or* assisted, *or* rescued, *or* attempted to rescue) , a State prisoner (*or* prisoner of war) in escaping from lawful custody; *or* knowingly harboured (*or* concealed, *or* offered, *or* attempted to offer resistance to the recapture of) , a State prisoner (*or* prisoner of war) who had previously escaped from lawful custody; and that you have thereby committed an offence punishable under Sect. 130 of the Indian Penal Code, and within, &c.

Evidence.

Prove that A B was in custody as a State prisoner or prisoner of war, and that the accused aided and assisted such prisoner to escape from lawful custody; or that the accused rescued him or attempted to rescue him from such custody. Or, that such prisoner having escaped from lawful custody, the accused, knowing the facts, harboured or concealed him, or offered, or attempted to offer, resistance to officers who were endeavouring to recapture him. The knowledge of the defendant may be proved either from the admission of the accused before a magistrate, or by evidence of circumstances from which the court or jury may fairly presume such a knowledge. For further remarks on this offence, in respect of its necessary ingredients, see the Chapter on Offences against Public Justice.

CHAPTER VII.

OFFENCES RELATING TO THE ARMY AND NAVY.

Sect. 131. *Abetting Mutiny, &c.*—Whoever abets the committing of mutiny by an officer, soldier, or sailor, in the army or navy of the Queen, or attempts to seduce any such officer, soldier or sailor, from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—In this section the words "officer" and "soldier" include any person subject to the articles of war for the better government of Her Majesty's army, or to the articles of war contained in Act No. V. of 1869. [*This explanation is added by* Act XXVII. *of* 1870.]

Sect. 132. *Abetting Mutiny, if Mutiny be committed in consequence thereof.*—Whoever abets the committing of mutiny by an officer, soldier, or sailor, in the army or navy of the Queen, shall, if mutiny be committed in consequence of that abetment, be punished with death, or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Sect. 133. *Abetting Assault by Soldier, &c.*—Whoever abets an assault by an officer, soldier, or sailor, in the army or navy of the Queen, on any superior officer, being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Sect. 134. *Abetting such Assault, if the Assault be committed.*—Whoever abets an assault by an officer, soldier, or sailor, in the army or navy of the Queen, on any superior officer,

being in the execution of his office, shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sect. 135. *Abetting Desertion.*—Whoever abets the desertion of any officer, soldier, or sailor, in the army or navy of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Sect. 136. *Harbouring a Deserter.*—Whoever, except as hereinafter excepted, knowing, or having reason to believe, that an officer, soldier, or sailor, in the army or navy of the Queen, has deserted, harbours such officer, soldier, or sailor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

Sect. 137. *Deserter concealed on Merchant Vessel.*—The master, or person in charge of a merchant vessel, on board of which any deserter from the army or navy of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred Rupees, if he might have known of such concealment, but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Sect. 138. *Abetting Act of Insubordination.*—Whoever abets what he knows to be an act of insubordination by an officer, soldier, or sailor, in the army or navy of the Queen, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Sect. 138A. *Application of Chapter to Indian Marine.*—**The foregoing sections of this chapter shall apply as if Her Majesty's Indian Marine Service were comprised in the navy of the Queen.** [Act XIV. of 1887, Sect. 79.]

Sect. 139. *Exception of Persons subject to Articles of War.*—**No person subject to any articles of war for the army or navy of the Queen, or for any part of such army or navy, is subject to punishment under this Code for any of the offences defined in this chapter.**

The offences enumerated in Sects. 131, 132, 134, *are triable by the Court of Session; that in Sect.* 133, *by the Court of Session, Presidency Magistrate or a Magistrate of the first class; those in Sects.* 135 *to* 138, *by a Presidency Magistrate or a Magistrate of the first or second class. Persons committing the offence described in this chapter may be arrested without a warrant, except in the case of offenders under Sect.* 137; *and a warrant shall issue in the first instance, except in respect of offences under Sect.* 137, *and in that case a summons. Under Sects.* 131 *to* 134, *defendants are not bailable, but under Sects.* 135 *to* 138 *they are. Not compoundable.*

Evidence.

All that is necessary in respect of these offences has already been provided by the general chapter on the subject of abetment, p. 109. The necessity for this chapter in the Code is thus explained in the Report of the Indian Law Commissioners: "It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not military who has abetted a military offence should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of an

abettor of an offence shall be equal or proportional to the punishment of the person who commits the offence. And this seems to us a sound principle when applied only to the punishments provided by the Code. But the military penal law is, and necessarily must be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person not military who abets a breach of military discipline should be made liable to a punishment, regulated according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who would induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, a ravisher, or a kidnapper."

WEARING THE DRESS OF A SOLDIER.

Sect. 140. *Wearing the Dress of a Soldier.*—**Whoever, not being a soldier in the military or naval service of the Queen, wears any garb, or carries any token resembling any garb or token used by such soldier, with the intention that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred Rupees, or with both.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, on or about the day of , at , not being a private soldier in the Bombay Native Infantry (or in any portion of Her Majesty's military service), did wear a certain garb (*or* carry a certain token) resembling the garb (*or* token) used by the private soldiers of the regiment of the Bombay Native

Infantry, with the intention that it should be believed that you were at the time of such wearing a private soldier in the said regiment of Bombay Native Infantry; and that you have thereby committed an offence punishable under Sect. 140 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the accused wore some military dress in use in some portion of the Queen's service, and that he was not entitled to wear it. This section does not, however, prohibit or render punishable the mere wearing of any garb or dress or token; but the wearing must be shown to have been for the purpose of inducing people to believe that the wearer was at the time of wearing actually in the service to which the garb or token belonged, and not merely for the purpose of representing that he had been in such service. Much less does the Code prohibit the wearing of cast-off uniforms for the mere purpose of clothing.

CHAPTER VIII.

OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

UNLAWFUL ASSEMBLY.

Sect. 141. *Unlawful Assembly.*—An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is—

First, To overawe by criminal force, or show of criminal force the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant; or,

Second, To resist the execution of any law, or of any legal process; or,

Third, To commit any mischief or criminal trespass, or other offence; or

Fourth, By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

Fifth, By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

Sect. 142. *Being a Member of an Unlawful Assembly.*—Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly.

Sect. 143. *Punishment.*—**Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.**

Sect. 144. *Joining Unlawful Assembly armed.*—**Whoever, being armed with any deadly weapon, or with anything which, being used as weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Sect. 145. *Joining or continuing in an Unlawful Assembly, knowing that it has been commanded to disperse.* –**Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Triable by any Magistrate. A summons should issue in the first instance under Sect. 143*; a warrant under Sects.* 144 *and* 145. *Police officers may arrest without warrant. Defendants are bailable. Not compoundable.*

Charge.

That you, on or about the day of , at (being armed with a deadly weapon, to wit: a gun, *or* a certain thing which, used as a weapon of offence, is likely to cause death, to wit: a life-preserver), together with other persons to the number of five, were a member of an unlawful assembly, and that you have thereby committed an offence punishable under Sect. 143 (144) of the Indian Penal Code, and within, &c.

Evidence.

Prove the assembly of five or more persons for any one of the objects enumerated in Sect. 141, which renders the assembly unlawful in its inception; or that the assembly, having come together for a lawful object, at some period during its continuance, one

of these objects was adopted as its common purpose, by which it will be changed from a lawful to an unlawful assembly. In Sect. 141 the word "offence" denotes anything punishable under the Penal Code, or under any special or local law, provided the thing punishable under such special or local law is punishable with imprisonment for six months or upwards, whether with, or without fine; *Sect.* 40.

It is necessary also to prove that the defendant was aware of the object for which the meeting assembled, or of the object which was adopted during its continuance. This may be shown from the defendant's acts, or from those of the assembly, done in his presence, or from words spoken in his hearing, or from any other facts from which it may reasonably be inferred that he was cognisant of the object of the meeting. Finally, prove that the accused intentionally joined or continued in the assembly after he knew its character. If the accused joined merely from curiosity, to hear what was going on, and as soon as he had found out its object, went away; or if, being in the crowd, he was unable to extricate himself, he will not be guilty of the offence mentioned in this section; nor, if he joined under compulsion, or was kept in the assembly by force: but if, after having joined by compulsion, he took any active part in the proceedings, or did not leave as soon as the coercion ceased, he would be guilty of the offence of being a member of an unlawful assembly.

If it be proved that the accused, in addition to being a member of an unlawful assembly, was also armed with a gun or other deadly weapon, or with anything which might be used as a weapon of offence, and which when so used was likely to cause death, he will be guilty of the higher offence of being an armed member of an unlawful assembly, and liable to punishment under Sect. 144.

Under English law, every man may in a *peaceable* manner assemble a meet company to do any lawful thing, or to remove or cast down any common nuisance done to them, and that before any prejudice received thereby, and for that purpose may also enter into the other man's ground. But, if in removing any such nuisance, the persons so assembled shall use any threatening words, or any other behaviour in apparent disturbance of the peace, then it will amount to a riot; *Dalt. J. P.* 445, 446; *i.e.*, a

riot under English law. The law as thus laid down has been applied in India to the case of an unlawful assembly and riot under the Penal Code; *Ganouri* v. *Emp. I. L. R.* 16 *Calc.* 206. If a number of persons assemble for a lawful purpose, and with the intention of carrying it out lawfully, the assembly does not become unlawful because they knew they would be opposed, and had good reason to believe that a breach of the peace would be committed *by those who opposed them; Beatty* v. *Gillbanks*, 9 *Q. B. D.* 308; *Sundram* v. *Reg. I. L. R.* 6 *Mad.* 203. If a number of persons assembled for a lawful purpose, suddenly, and without any previous intention or design, quarrel with an intruder, that does not change the meeting into an unlawful assembly; *Khajah Nooral* v. *Fabre-Tonnerre*, 24 *W. R. Cr.* 26. So the illegal acts of one or two members of a legal assembly, not acquiesced in by the others do not change the character of the assembly; *Reg.* v. *Dinobundo*, 9 *W. R. Cr.* 19.

No charge of being a member of an unlawful assembly can be maintained where the intention of the accused parties was not to enforce a right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised; *Birjoo Singh* v. *Khub Lall*, 19 *W. R. Cr.* 66; *In re Sunker Singh*, 23 *W. R. Cr.* 25. But where, on the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a long standing dispute between the accused and certain other parties regarding the possession of certain land, that neither of the parties was in undisturbed possession of the land, that the accused went to sow the land with indigo accompanied by a body of men armed with *lattees*, that they were prepared to use force, if necessary, and that the *lattials* kept off the opposite party by brandishing their weapons, while the land was sowed; it was held that the accused were rightly convicted under Sect. 142; *In re Peary Mohun, I. L. R.* 9 *Calc.* 639. Mere numbers, however, will not make an assembly unlawful when the object is to procure some public result, if the means by which that result is to be attained be lawful. But where the defendants assembled and forcibly interrupted a procession, it was held that that act was forbidden by cl. 4 of Sect. 141, although they acted upon the ground that the procession was a nuisance or annoyance to them or their

community; 5 *Madras H. C. Rep. App.* 6. Where, however, the accused, who were servants of B, found the servants of A attempting to erect a building on land in the joint possession of A and B, and on which it had been declared by a court of law that A had no right to erect any building, and thrust aside the servants of A, throwing one man to the ground, and demolished the erection; it was held that the accused were merely exercising the right of abating a private nuisance and were not committing an offence under Sect. 141; *Emp.* v. *Rajcomar Singh, I. L. R.* 3 *Calc.* 573; but where there is a dispute about a civil right, and one party is exercising that right, the opposite party has no excuse for interfering with the exercise of that right by using criminal force; *Ganouri* v. *Emp. I. L. R.* 16 *Calc.* 206. Meetings for the purpose of eliciting, declaring, or altering public opinion on any matter are perfectly legal; and if, further, it is the intention of the promoters to get up a petition to Government, the meeting will have the additional sanction of the Bill of Rights—1 Wm. and Mary, s. 2, c. 2—which declares "that it is the right of the subjects to petition the King, and that all commitments and prosecutions for such petitions are illegal." But meetings which are held under the cloak of petitioning or public discussion merely for the purpose of intimidation will be illegal, in spite of the apparent legality of their object.

Being Member of Unlawful Assembly after command to disperse.

Charge.

That you, on or about the day of , at , joined (*or* continued in) an unlawful assembly, knowing at the time you so joined (*or* continued in) such assembly that the said assembly had been commanded to disperse, in the manner prescribed by law, to wit: by (*here state how the assembly was ordered to disperse*), and that you thereby committed an offence punishable under Sect. 145 of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of an unlawful assembly, that such assembly had been commanded to disperse in the manner prescribed by the Criminal Procedure Code, 1882, Sect. 127, *i.e.*, by a magistrate or officer in charge of a police station—and that the accused joined,

or still continued in, the assembly, after such command to disperse. The same remarks as to the liability of persons in the assembly apply in this case as in the previous one. It is necessary, however, that persons should be very careful how they join an assembly, as it is very difficult to separate the acts of one person from those of the crowd, and innocent individuals may thus be mixed up with the guilty, in such a way as to become legally responsible for the acts of the assembly as a whole.

RIOTING.

Sect. 146. *Riot.*—**Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.**

Sect. 147. *Punishment for Rioting.*—**Whoever is guilty of rioting shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Sect. 148. *Rioting, armed with a Deadly Weapon.*—**Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.**

Sect. 149. *Offence committed in prosecution of Common Object.*—**If an offence is committed by any member of an unlawful assembly, in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.**

Offences under Sect. 147 *are triable by any Magistrate; those under Sect.* 148 *by the Court of Session, Presidency Magistrate, or Magistrate of the first class; those under Sect.* 149, *by the Court by which the offence committed is triable. A warrant should issue in*

the first instance under Sect. 147, *a summons under Sect.* 148. *Police officers may arrest without a warrant, and defendants are bailable under Sects.* 147 *and* 148. *Under Sect.* 149, *these particulars depend upon the limitations laid down in respect of the offence committed. Not compoundable.*

Charge.

That you, on or about the day of , at , (being armed with a deadly weapon, to wit: a gun, *or* with a certain thing which, used as a weapon of offence, is likely to produce death, to wit: a life-preserver), committed the offence of rioting; and that you thereby committed an offence punishable under Sect. 147 (*or* 148) of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of an unlawful assembly; prove that the assembly used force or violence in the prosecution of the common object, or that some member of the assembly used force or violence in the prosecution of such object, and that the accused was a member of the assembly. If the charge be one of rioting armed, prove further that the accused was armed with a gun or other deadly weapon, or with something which, if used as a weapon of offence, would be likely to cause death. For a definition of what constitutes force, see Sect. 349 of the Penal Code. In order to support a conviction under this section, it is necessary that the convicted persons should have been members of an unlawful assembly. Where, therefore, the common object of an assembly of more than five persons was to resist by force an unlawful trespass upon land, and the Sessions Judge convicted all the persons but four, on the ground that they had exceeded their right of private defence, it was held that the conviction could not be supported, as the accused were not members of an unlawful assembly; *In re Kalee Mundle,* 10 *C. L. R.* 278; see also *In re Sunker Singh,* 23 *W. R. Cr.* 25, *ante, p.* 153; *In re Toolsee Singh,* 10 *W. R. Cr.* 64; and *Reg.* v. *Guru Charan,* 6 *Ben. L. R. App.* 9, *post, p.* 159. Under the English law, if speeches of a riotous character be made, the speakers are guilty of rioting, although they leave the meeting before the actual disturbance takes place, provided it occur immediately; *R.* v. *Sharp,* 3 *Cox Crim. Ca.* 288; and so doubtless under the

present sections they would be also; or they might be charged, under Sect. 153, with wantonly provoking to riot, if the particular form of words has been made punishable under the Code, or has been prohibited in any other way by law, or furnishes ground for a civil action.

Sect. 149 does not *create* an offence but is declaratory of a principle of the common law which prevailed in England; *Emp.* v. *Bisheshur, I. L. R.* 9 *All.* at p. 649. It was never intended that every member of an unlawful assembly is to be responsible for *every* offence committed by any particular member while prosecuting their common object; but only for such offences as it can be shown the members contemplated would or might be committed in furtherance of their common design; or such offences as must or might naturally, and not by a sudden and unpremeditated act, arise from the prosecution of their common object; *Reg.* v. *Sabid Ali*, 20 *W. R. Cr.* 5, and 11 *B. L. R.* 347. Thus, if an assembly is convened for the purpose of overawing the Governor-General, and in furtherance of that object attempts to force an entry into the Government House, and in the course of resistance to such attempt any one guarding the doors is killed, each one in the assembly is guilty of murder; but if, on the road from the place of meeting to the Government House, one of the assembly picks a bystander's pocket, the thief alone is guilty, and no one else in the assembly necessarily partakes of his guilt. In accordance with this, where the accused men were members of an unlawful assembly, the common object of which was the abduction of a certain woman, and all bore arms, and during the prosecution of that object the woman's daughter interfered to prevent the abduction of her mother, and was killed by one of the accused, it was held that each of the members was guilty of the offence of murder, all being prepared to resist any attempt which might be made to prevent them from accomplishing their designs; *In re Golam Arfin*, 4 *Ben. L. R. App.* 47, and 13 *W. R. Cr.* 33. But where a large body of men belonging to one faction waylaid another body of men belonging to another faction, and a fight ensued, in the course of which a member of the first faction was wounded, and retired to the side of the road, taking no further part in the affray, and after such retirement a member of the

second faction was killed, it was held by *Norman*, J., (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not under Sect. 149 be made liable for the subsequent murder; *Reg.* v. *Cabil Kazee*, 3 *Ben. L. R. A. Cr. J.* 1. Where a prisoner can only be held constructively guilty of murder under Sect. 34 of the Penal Code, it is doubtful whether he can be said to have committed murder within the meaning of Sect. 149, so as to make other persons acting with him, by a double construction, guilty of murder; *In re Jhubboo Mahton*, *I. L. R.* 8 *Calc.* 739. In a charge under this section the facts necessary to bring it under the section should be shortly stated and the charge should wind up by an allegation that the accused has committed an offence punishable under the section relating to the particular offence charged to have been committed, and not under this section which does not provide a punishment, but only declares that under certain circumstances an accused person is guilty of an offence actually committed by some one else. Where a person is only constructively guilty, under Sect. 149, of grievous hurt committed by another member of an unlawful assembly, but did not himself commit that offence, it is not legal to pass upon him a separate sentence for the offence of rioting, and also one for voluntarily causing grievous hurt; *Nilmony* v. *Emp. I. L. R.* 16 *Calc.* 442 (F. B.)

Where there has been no unlawful assembly, but a sudden quarrel and an affray, from which resulted grievous hurt, and consequent death, there can only be a conviction for an affray, and not one for rioting; *Reg.* v. *Phoollee Misser*, 12 *W. R. Cr.* 72. In this case the question whether any one of the accused was guilty of culpable homicide does not seem to have been considered by the court.

Where a riot took place, both parties turning out armed with deadly weapons, it cannot be said that there was any right of private defence on either side, as both parties well knew beforehand what was likely to take place. An indigo factory has no right forcibly to attempt to sow indigo in land already sown with corn, although it was indigo contract land; and villagers have no right to oppose such forcible sowing by force, especially

when a police station is near at hand; *Reg.* v. *Jeolull*, 3 *R. C. C. Cr.* 21, and 2 *Madras Jurist*, 168. It is also immaterial under such circumstances which party was the first to attack, unless it is shown that the other party was acting within the limits of the right of private defence; *In re Kalee Beparee*, 1 *C. L. R.* 521. But where, in investigating a case of dispute as to land between two parties, under Chapter XXII. of Act XXV. of 1861 (the old Code of Criminal Procedure), the magistrate found that one party was in possession and the other party was attempting to turn them out, and there being a charge against both parties of rioting, under Sect. 147, and convicted and punished both, the High Court held that the party in possession was protected by Sect. 104 of the Penal Code in maintaining their possession; *In re Toolsee Singh*, 2 *Ben. L. R. A. Cr. J.* 16, and 10 *W. R. Cr.* 64. So, too, where the prisoners, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crops, not having time to complain to the police, inflicted a wound on one of the other party with a bamboo, from the effects of which he died, the High Court held that the force used and the injuries inflicted were not such as to exceed their right of private defence of their property; *Reg.* v. *Guru Charan*, 6 *Ben. L. R. App.* 9.

A plea of right to possession is no answer to a charge of rioting by making a forcible entry on land cultivated by a trespasser, who is in possession and opposes the entry; *Appavu Nayah* v. *Reg. I. L. R. Mad.* 245.

Rioting, armed with a deadly weapon, is a distinct offence from stabbing a person on whose premises the riot takes place, and each may be separately punished; *Reg.* v. *Kallachand, Calcutta H. C.*, 2 *Madras Jurist*, 282; and *Emp.* v. *Ram Adhin, I. L. R.* 2 *All.* 139. But where the prisoners were charged with rioting, being armed with deadly weapons, and with causing hurt by shooting, and their conviction for the latter offence rested solely on the fact of their belonging to a party, by one of whom (not in custody) firearms were used, it was held to be wrong, under the old Procedure Code, to pass a cumulative sentence, and to punish the prisoners both for the rioting and the causing hurt, but that the punishment should have been for one or other of these two offences; *Reg.* v. *Durzoolla*, 9 *W. R. Crim.* 33; and see also *Reg.* v. *Dina Sheikh*,

10 *W. R. Crim.* 63. But a cumulative sentence would now be good. Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, as they had not one common object within the meaning of Sect. 141; each party should be committed for trial and tried separately; *Reg.* v. *Durzoolla*, 9 *W. R. Cr.* 33; and *Reg.* v. *Suroop Chunder*, 12 *W. R. Cr.* 75.

Thirteen persons were charged with rioting, twelve were acquitted and one convicted. *Quære*, whether the verdict can be sustained when the evidence points only to the thirteen arraigned and to no others, seeing that the Code says that five men at least must be concerned in order to constitute a riot; *Reg.* v. *Chinnapa Chetty*, 2 *Madras Jurist*, 169.

In the High Court in Bengal it has been ruled that "it is quite enough to charge the prisoner with the offence of rioting punishable under Sect. 147 of the Indian Penal Code"; but where "the committing officer has resolved the crime into its elementary facts in the charge, all that combined to constitute the offence should have been charged"; 1 *W. R. Cr. L.* 10, 4 *R. J. and P.* 413. As respects the High Court in Madras, Mr. Mayne says that their tendency is "to resolve such technical terms into their elements, so as to explain to the prisoner what he is charged with."

In a charge under Sect. 149, the common object of the unlawful assembly should be stated; 1 *R. C. C. Circ.* 3, 16.

HIRING PERSONS TO ASSIST IN AN UNLAWFUL ASSEMBLY, &c.

Sect. 150. *Hiring, &c., Persons to join an Unlawful Assembly.* —**Whoever hires, or engages, or employs, or promotes, or connives at the hiring, engagement, or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement, or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.**

Sect. 151. See p. 163.

Sect. 152. See p. 164.

Sect. 153. See p. 165.

Sects. 154 to 156. See pp. 167 and 168.

Sect. 157. See p. 171.

Sect. 158. *Being hired to take part in, &c., an Unlawful Assembly, &c.*—**Whoever is engaged or hired, or offers or attempts to be hired or engaged to do or assist in doing any of the acts specified in Sect. 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both; and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed with any deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Offenders under Sect. 150 *are triable by the Court by which the offence committed is triable; those under Sect.* 158 *by a Presidency Magistrate or a Magistrate of the first or second class. Under Sect.* 158, *a summons should issue in the first instance, unless the hiring be to go armed, then a warrant. Police officers may arrest without a warrant. Under Sect.* 158 *defendants are bailable; under Sect.* 150, *they are bailable if the offence committed is bailable, otherwise not. Under Sect.* 150, *the issue of a warrant or summons will depend upon the offence committed. Not compoundable.*

Charge of Hiring.

That you, on or about the day of , at , hired a certain person, to wit: C D, to become a member of an unlawful assembly, and that you have thereby committed an offence punishable under Sects. 143 and 150 of the Indian Penal Code, and within, &c.

Charge of being Hired.

That you, on or about the day of , at , were hired by a certain person, to wit: C D, for the purpose of doing an act specified in Sect. 141 of the Indian Penal Code, to wit: for

the purpose of overawing by means of criminal force the Lieutenant-Governor of the North-West Provinces; and that you have thereby committed an offence punishable under Sect. 158 of the Indian Penal Code, and within, &c.

The charges in the other cases referred to in these two sections can easily be framed upon these two models.

Evidence.

In the case of a charge against the person hiring another, prove the hiring, engagement, or employment of some person to become a member of an unlawful assembly. The hiring must be complete, *i.e.*, both hirer and hired must have come to an agreement upon the subject-matter of the agreement; it will not be sufficient that an offer merely of hiring, &c., should have been made, for the section mentions nothing about an attempt to hire, and by its wording evidently intends that there should be a *locus pœnitentiæ*, so that a person asking another to do certain acts may be able to retract what he had said, and refuse to hire before the person applied to has consented to do what he has asked; in this the present section differs from Sect. 158, which allows no such *locus pœnitentiæ*. Should, however, the complete hiring, &c., be not proved, the defendant may still be charged with an attempt to hire under Sect. 511 of the Penal Code. If the accused did not himself hire, prove that he promoted or connived at the hiring by some other person. The word promote refers to cases of active assistance in hiring, and must be positively proved. Connivance is a passive allowance of something by a person who is legally bound and physically able to prevent that thing being done. It will therefore be necessary to prove this negative offence of connivance by the concurrence of three things: *first*, that the person accused was legally bound to prevent the hiring; *second*, that he was physically able to prevent it; *third*, that he did not prevent it, or do all that lay in his power towards preventing it. In this case, as in the last, a complete hiring must be proved; and if it be not proved, no charge of an attempt can be made against the defendant, as it is manifest a man cannot attempt to connive, he must either connive, or else not connive. But it is not necessary to prove that the person hired took any part in an unlawful assembly, unless it is desired to prove that he committed some offence in pursuance of such hiring.

In the case of a charge of hiring under Sect. 150, if the full offence be proved, the person hired is guilty under Sect. 158. In order, however, to bring the defendant within the latter section, it is sufficient if he offers himself, or attempts to be hired to do or assist in doing any of the acts specified in Sect. 141. In the event of the defendant being proved to have offered to go armed, he is guilty of a more serious offence, and is liable to severer punishment. There is no similar provision for the case of a person who engages another to go armed, and this is only met by the latter clause of Sect. 150, which provides that in the event of the person hired committing any offence in pursuance of the common object of the unlawful assembly, the hirer shall be liable to punishment in the same way as if he had himself been a member of the unlawful assembly, or himself had committed the offence. In this case the following will be the form of the

Charge.

That you, the said A B, on or about the day of , at , hired one C D to become a member of an unlawful assembly, and that the said C D, as a member of such unlawful assembly, and in pursuance of such hiring, voluntarily caused grievous hurt to one E F; and that you, the said A B, have thereby committed an offence punishable under Sects. 150 and 325 of the Indian Penal Code, and within, &c.

JOINING ASSEMBLY OF FIVE.

Sect. 151. *Joining Assembly of Five.*—**Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.**

Explanation.—**If the assembly is an unlawful assembly within the meaning of Sect. 141, the offender will be punishable under Sect. 145.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , knowingly joined (*or* continued in) an assembly of five (*or* more than five) persons, such assembly being one likely to cause a disturbance of the public peace, the said assembly having been lawfully commanded to disperse before you, the said A B, joined (*or* continued in) the same, and that you thereby committed an offence punishable under Sect. 151 of the Indian Penal Code, and within, &c.

Evidence.

Prove that there was an assembly of five persons at the least, that such assembly was likely to cause a disturbance of the public peace, and that the assembly had been lawfully commanded to disperse, *i.e.*, by a magistrate or an officer in charge of a police station. Prove that after such command the accused either joined or continued in the assembly. If the assembly be not merely one likely to disturb the public, but one collected for any of the purposes enumerated in Sect. 141, then the accused will be a member of an unlawful assembly, and be amenable under that section.

Where the object of three persons only was to draw a crowd and their action was such as was calculated to, and did, draw a crowd of fifty or sixty persons, likely to cause a disturbance of the public peace, it was held that the gathering constituted an assembly of five or more persons within this section, and that a refusal to disperse after being lawfully commanded so to do, rendered every member of the gathering liable to conviction under this section; *Emp.* v. *Tucker, I. L. R.* 7 *Bom.* 42.

RESISTING PUBLIC SERVANT.

Sect. 152. *Assaulting, &c., Public Servant in suppressing Riot, &c.*—**Whoever assaults or threatens to assault, or obstructs or threatens to obstruct, any public servant in the discharge of his duty as such public servant in endeavouring**

to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens to use, criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

PROVOKING TO RIOT.

Sect. 153. *Wantonly provoking to Riot.*—**Whoever maliguantly or wantonly, by doing anything which is illegal, gives provocation to any person, intending, or knowing it to be likely, that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.**

Triable by any Magistrate. If the riot be committed a warrant should issue in the first instance, otherwise a summons. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

This section is very vague and comprehensive in its terms. Until a case arises under it, it is impossible to draw a charge, or define with accuracy what evidence will be required to sustain it. The first thing, however, will be to prove that some illegal act was done, *i.e.*, some act which is punishable under the Penal Code, or which is prohibited by law, or which forms the subject of a civil action. Then this act must be done either malignantly or wantonly. The word malignantly, I conceive, signifies more than maliciously. An act which is malignant is also malicious, but every malicious act is not malignant.

Malitia, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person; but this is not the legal sense: and *Lord Holt*, C. J. says:—"Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind"; *Kel.* 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it in *De Naturâ Deorum*, *lib.* 3, *s.* 18, as "*versuta et fallax nocendi ratio.*" Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse"; per *Littledale*, J., in *M'Pherson* v. *Daniels*, 10 *B. and C.* 272. *Best*, J., in *Rex* v. *Harvey*, 2 *B. and C.* 268, also says:—"We must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind"; *Russell on Crimes*, i. 668. Malignant, beyond this, imports extreme malevolence or enmity, a disposition to do harm, in the mind of the person who perpetrates the act to which the term is applied. Whether in practice there will be held to be any distinction between maliciously and malignantly remains to be seen.

Wantonly means, without any lawful object, almost without any definite object, but out of a spirit either of pure mischief or fun. The use of this word in connection with malignantly very much weakens the force of the latter.

Then the act must be one which is likely to cause a riot. But by whom is the rioting to be committed? Riot involves an unlawful assembly and force, used in prosecution of the object of the assembly. Now, an assembly of five or more to resist provocative acts, and force used in such resistance, would in very many cases be perfectly justifiable. Therefore it would seem that the operation of this section must be confined to a very small number of

cases, or else that the riot must be on behalf of him who does the illegal act, and that others to the number of five, assembled together for one of the objects prohibited in Sect. 141 and stirred up by his acts, must join in its commission.

OFFENCES OF OWNERS AND OCCUPIERS OF LAND.

Sect. 154. *Owner, &c., of Land on which an Unlawful Assembly is held.*—**Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he, or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.**

Sect. 155. *Liability of Person for whose Benefit a Riot is committed.*—**Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he, or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.**

Sect. 156. *Liability of Agent of Owner for whose Benefit a Riot is committed.*—**Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place, and for suppressing and dispersing the same.**

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That, on or about the day of , at , an unlawful assembly was held (*or* a riot was committed) upon certain land, to wit, , belonging to (*or* in the occupation of) the said A B; and that the said A B (*or* C D, the agent *or* manager of the said A B), well knowing that the said unlawful assembly was being held on the said land, did not give the earliest notice thereof in his power to the principal officer at the nearest police station, to wit, E F at , and did not use all the lawful means in his power to disperse the said unlawful assembly; whereby the said A B *or* C D has committed an offence punishable under Sect. 154 of the Indian Penal Code, and within, &c.

Evidence.

Sect. 154 is to meet the case of an unlawful assembly or a riot taking place on land, there being no connection between the cause of the assembly or riot and the owner of the land; Sects. 155 and 156 provide for the case of a riot for the benefit of the owner of the land on which it takes place. To bring a defendant within

the first of these sections, it will be necessary to prove that a riot or unlawful assembly did take place on land belonging to the defendant, either as owner or occupier, or in which he has or claims an interest. What interest is sufficient to support the charge is not defined, but it must be such an interest as will give the defendant a right to interfere in the management of the land, or to go upon it, else he might be punished for not suppressing the riot when he had no power to go upon the land for that purpose. The son of a tenant in tail under a marriage settlement, or the reversioner expectant upon the determination of a life estate, it is submitted, would not be persons having or claiming an interest in land under this section.

In the next place, it must be shown that the fact that the unlawful assembly or riot was about to take place, or was actually taking place, came to the knowledge of the defendant, or his agent or manager, either by direct proof, or by evidence from which the knowledge might be inferred. Then it must be proved that neither the defendant nor his agent or manager gave information to the principal officer at the nearest police station. This provision fixes definitively the officer to whom the information must be given, and makes the proof of this portion of the offence easy, which is not so in the case of a concealment of a design to wage war under Sect. 123. If, however, the defendant gave information to any officer at the police station, it could scarcely be said that he had not done what was required of him. Finally, it must be shown that neither the defendant, nor his manager or agent, used all lawful means in their power to prevent the assembly taking place, or if it had already begun, to disperse or suppress it; see *Reg.* v. *Surroop Chunder*, 12 *W. R. Cr.* 75. The words of the section are very wide, sufficiently so to include such a case as the following: An unlawful assembly takes place on land unknown to the owner, but known to, and perhaps aided and abetted by, the owner's agent. The agent does not obey the directions of this section, and stop the unlawful assembly. Is the owner liable to to fine? Under the strict letter of the section he is, but surely such could not have been the intention of the framers of the Code. In England, in the case of *Reg.* v. *Stephens*, 10 *Cox, Crim. C.* 340, a man was made liable criminally for a nuisance committed by his

servants; but the nuisance arose in the course of the defendant's trade, and had continued a long time, although the course of business which created the nuisance had been positively forbidden by him. It has also been held that an owner is punishable if his land is made filthy by other persons while it is in his occupation, but not if he has sublet it; *Reg.* v. *Parbutty Churn*, 3 *W. R. Cr.* 57. In the present case, however, the act or omission which constitutes the offence may be an isolated one, and unconnected with anything else, and the owner is supposed to be away from the land, and so to a certain extent not in occupation. A non-resident partner who has taken no active share in the management of the estate cannot be convicted in addition to the resident partner; *In re Radha Nath*, 7 *C. L. R.* 289.

With respect to Sects. 155 and 156, the evidence will be very similiar to that required to support a charge under Sect. 154. The defendant must have an interest in the land, &c., which, however, need not be so large as in the previous case, as the riot is assumed to be for his benefit; therefore, *any* interest will be sufficient; *Reg.* v. *Harnath Roy*, 3 *W. R. Cr.* 54. The riot, too, must be proved to have been committed with reference to some particular land, &c., and for the benefit of the owner of such land, &c., and that he, or his agent, knowing of the likelihood of the riot occurring, did not use all lawful means to prevent it. Under the latter of these two sections, the agent or manager is made liable as well as the owner.

In order to convict a manager under Sect. 156, it is necessary to prove that a riot was committed, that it was committed for the benefit of the owner or occupier of the land, and finally that the manager knew that the riot was likely to be committed and did not use all lawful means to prevent it; *Brae* v. *Emp. I. L. R.* 10 *Calc.* 338.

HARBOURING PERSONS HIRED.

Sect. 157. *Harbouring, &c., Persons hired for an Unlawful Assembly.*—**Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged, or employed, or are about to be**

hired, engaged, or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

Sect. 158. See p. 161.

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

It is not enough to show that some of accused's servants have been taken from a district where men have a well known character as *lattials*, and had been in his service sometime before a riot was perpetrated by them; *In re Radha Nath*, 7 *C. L. R.* 289. There must be a harbouring, reception, or assembly with a knowledge that the persons so harboured, received or assembled have been, or are about to be hired, &c., *for the purpose* of joining an unlawful assembly.

AFFRAY.

Sect. 159. *Affray.*—**When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray."**

Sect. 160. *Punishment for committing Affray.*—**Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine, which may extend to one hundred rupees, or with both.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, on or about the day of , at , did commit an affray, and that you thereby committed an offence punishable under Sect. 160 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant fought with another person in a public place, for if it be in private, it is an assault merely, and not an affray; 1 *Hauk, c.* 63, *s.* 1. Also, no quarrelsome or threatening words whatever will amount to an affray; *id. s.* 3; nor indeed do mere words amount to an assault. This section is simply an enactment of the English common law.

On conviction, defendants may be ordered to find sureties to keep the peace in addition to any other punishment.

CHAPTER IX.

OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

BRIBERY.

Sect. 161. *Public Servant taking Illegal Gratification.*—Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or dis-service to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

"Gratification." The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public

servant can lawfully demand, but include all remuneration which he is permitted by the Government which he serves to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(*a*) A, a moonsiff, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed an offence defined in this section.

(*b*) A, holding the office of resident at the court of a subsidiary power, accepts a lakh of rupees from the minister of that power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that power, A has committed the offence defined in this section.

(*c*) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

Sect. 162. *Taking a Gratification, in order, by Corrupt or Illegal Means, to influence a Public Servant.*—Whoever accepts, or obtains, or agrees to accept, or attempts to obtain,

from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant, to show favour or disfavour to any person, or to render or attempt to render any service or dis-service to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Sect. 163. *Taking a Gratification for the Exercise of Personal Influence.*—Whoever accepts, or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or dis-service to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both.

Illustrations.

An advocate who receives a fee for arguing a case before a judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the service and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Gov-

ernment statements tending to show that the condemnation was unjust—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

Sect. 164. *Punishment for Abetment by Public Servant of the Offences above defined.*—Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Sect. 165. *Public Servant obtaining Valuable Thing without Consideration.*—Whoever, being a public servant, accepts or obtains, or agrees to accept, or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself, or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*a*) **A, a collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.**

(*b*) **A, a judge, buys of Z, who has a cause pending in A's court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.**

(*c*) **Z's brother is apprehended and taken before A, a magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing, obtained by him without adequate consideration.**

Offences under Sects. 161, 162, *and* 164 *are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class; those under Sect.* 163 *by a Presidency Magistrate, or a Magistrate of the first class; and those under Sect.* 165 *by a Presidency Magistrate, or a Magistrate of the first or second class. A summons is to be issued in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 197, *Cr. P. C.*, 1882, *when the accused is one of the public servants described therein.*

Charge under Sect. 161.

1. That on or about the day of A B, then being (or expecting to be) a public servant, to wit: obtained for himself from one C D a gratification other than legal

remuneration, to wit, as a motive for doing an official act, to wit, and that he thereby committed an offence punishable under Sect. 161 of the Indian Penal Code, and within, &c.

2. That on the day and year aforesaid, the said A B, then being (or expecting to be) a public servant as aforesaid, obtained for himself from the said C D a gratification other than legal remuneration, to wit, the said as a reward for showing in the exercise of his official functions favour to the said C D, and that he thereby committed an offence punishable under Sect. 161 of the Indian Penal Code, and within, &c.

Evidence.

The use of mere personal influence will not be sufficient to bring any person within these sections, nor any amount of persuasion. Influence must be accompanied by gratification, or must be the result of gratification. If persuasion were changed into threats, then that would constitute an offence under Sect. 189.

A person receiving "a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done," as described in the third explanation to Sect. 161, will not only have committed an offence under that section, but will also be guilty of cheating; in the latter case, by virtue of the definition of cheating given in Sect. 415—and in the former, by virtue of that definition, coupled with illustration *f*, annexed to Sect. 415.

With reference to this class of cases, it will be well to quote from Lord Mansfield's judgment in the case of *Rex* v. *Woodfall*, 5 *Burrows*, 2667, what he says as to intent: "Where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but, where the act is in itself unlawful, the proof of justification lies on the defendant, and in failure thereof, the law implies a criminal intent."

The definition of the word "judge" is given in Sect. 19, p. 24, and that of "public servant" in Sect. 21, p. 25. Act XXXI. of 1867 extends the meaning of the words "Government and public servant" so as to include railway and tramway companies and their servants respectively, so far as relates to Sects. 161 and 162.

This provision was introduced in order to put a stop to the large amount of bribery which was constantly taking place among railway servants in respect of contracts, and work done under contracts, &c.

Act I. of 1876 provides that every telegraph officer shall be deemed to be a public servant for the purposes of these five sections.

To ask for a bribe is to attempt to obtain it; and a bribe may be asked for as effectually in implicit as in explicit terms. Therefore where B, who was employed as a clerk in the Pension department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department, and instancing two cases in which, by that influence, increased pensions had been obtained, proceeded to intimate that anything might be obtained by *kar-rawai*, and on the overture being rejected, concluded by declaring that A would rue the rejection of B's suggestions; it was held that the offence of attempting to obtain a bribe had been completed; *Emp.* v. *Baldeo Sahai*, *I. L. R.* 2 *All.* 253. A person who accepts, as a private person, a gratification for exerting his influence with a public servant is punishable under Sect. 162; *Reg.* v. *Oboy Churn*, 3 *W. R. Cr.* 19.

K, a police officer employed in a criminal court to read the diaries of cases investigated by the police, and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided, in which the accused were convicted, and a sum of money, the proceeds of the theft, had been made over to the prosecutor, asked for and received from the prosecutor a portion of such money, not as a reward or motive for doing any of the acts described in Sect. 161, but as *dasturi;* and it was held that K was not punishable under Sect. 161, but under Sect. 165; *Emp.* v. *Kampta Prasad*, *I. L. R.* 1 *All.* 530.

Where a complainant charged a person, who was one of the public servants mentioned in Sect. 167 of the Criminal Procedure Code, 1865, with committing acts which if committed by a private individual would have amounted to extortion, it was held that it was not illegal to treat the charge as one for extortion, and to proceed with the trial without having previously received the proper sanction for the prosecution, though it might have been more judicious to have treated it as an offence under Section 161

of the Penal Code, and obtained the necessary sanction; *Reg.* v. *Parshram Keshav*, 7 *Bom. H. C. Rep. C. C.* 61.

These sections apply *directly* to the persons who do, or would eventually, receive the gratification, but those who offer a gratification which is not accepted are guilty, under English law, of an attempt to bribe, which offence is complete as soon as the offer is made; *Rex* v. *Vaughan*, 4 *Burr. p.* 2501. Under the Penal Code, the person offering the bribe would at the moment of offering it be guilty of the offence of abetting the receipt of an illegal gratification, by inciting the person to whom it was offered to receive it. If the bribe was accepted, the offerer would be guilty of abetment, both by inciting and aiding.

The statute 5 and 6 Edwd. VI. c. 16 provides that any person who pays or offers money, &c., for an office shall immediately upon such payment or offer be adjudged incapable of occupying such office. This statute was, in *Rex* v. *Vaughan*, 4 *Burr.* 2500, held not to extend to the Colonies; but, subsequently, the statute 49 Geo. III. c. 126, extended its provisions to the Colonies and to all persons in the service of the East India Company; and further made the receipt or payment of money for an office a misdemeanour, and provided that if any chief officer of a Colony, &c., was guilty of an offence under the statute, he should be tried for the same in the Court of Queen's Bench at Westminster. The statute 21 and 22 Vict. c. 106, s. 64 further provides that all acts then applicable to servants of the East India Company, shall apply to all officers continued or appointed under that Act. Consequently all persons giving or offering a bribe for appointment to an officer under Government in India become at once incapable of holding that office, even though appointed to it, and are liable, even though the bribe be not accepted, to be punished for a misdemeanour in attempting to bribe.

Disobedience by Public Servants.

Sect. 166. *Disobedience by Public Servant with intent to cause Injury.*—**Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will by such**

disobedience cause, injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

Sect. 167. *Framing Incorrect Document.*—**Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause, or knowing it to be likely that he may thereby cause, injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.**

Offences under Sect. 166 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 167 *by the Court of Session, a Presidency Magistrate, or by a Magistrate of the first class. Defendants are bailable. Police officers may not arrest without a warrant. A summons should issue in the first instance. Not compoundable. Sanction required under Sect.* 197, *Cr. P. C.* 1882, *for the prosecution of the public servants described therein.*

Evidence.

Prove that the defendant is a public servant, and that he did the act laid in the charge. Prove also that the act has done injury, or that it was likely to the knowledge of the defendant to do injury, or that he intended that it should cause injury to some person. If it is one which was likely to do injury, the knowledge of the defendant may be inferred, especially if from his official position he ought to know what the result of his act would be

likely to be. The injury must be within reasonable limits, the direct result of the act. Thus, the mistranslation of a document, so as to convict a prisoner, would come within Sect. 167, as the conviction would be the immediate result of the act; but a mistranslation so as to acquit a prisoner would not, as the injury caused by the result to the Queen, the nominal prosecutor, or to the real prosecutor, would not be sufficiently direct and immediate. Such a case would be met by Sect. 218.

For other cases of disobedience by public servants, see Sects. 217-220.

Act XV. of 1872, Sect. 72, provides that a Marriage Registrar issuing a certificate for marriage at the times specified therein shall be deemed to have committed an offence under Sect. 166.

PUBLIC SERVANT TRADING, &c.

Sect. 168. *Public Servant engaging in Trade.*—**Whoever being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonmemt for a term which may extend to one year, or with fine, or with both.**

Sect. 169. *Public Servant unlawfully bidding for Property.*—**Whoever, being a public servant, and being legally bound, as such public servant, not to purchase, or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.**

Offences under these Sects. are triable by a Presidency Magistrate, or a Magistrate of the first class. Defendants are bailable. Police officers may not arrest without a warrant. A summons should issue in the first instance. Not compoundable. Sanction required under Sect. 197, *Cr. P. C.*, 1882, *for the prosecution of the public servants described therein.*

Charge of Trading.

That you, on or about the day of , at , being a public servant, to wit: , and being as such public servant legally bound not to engage in trade, did engage in trade; and that you have thereby committed an offence punishable under Sect. 168 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant was a public servant at the time of the commission of the alleged offence. The fact of his being prohibited to trade or to purchase certain property is a matter of which judicial notice will be taken by the courts, as it will appear from regulations or acts. The following are some of the Acts by which trading is prohibited to public servants:—Persons employed in the collection of revenue or administration of justice in Bengal, Behar, and Orissa, 33 Geo. III. c. 52, s. 137; Administrator General, Act II. of 1874, Sect. 10; Forest Officers, Act. VII. of 1878, Sect. 74; Police Officers, Act. V. of 1861, Sect. 10, Act XXIV. of 1859, Sect. 19, and Bom. Act VII. of 1867, Sect. 11; Officers of Presidency Banks, Act XI. of 1876, Sect. 34, and Act V. of 1879, Sect. 3; Revenue Officers, Bom. Act V. of 1879, Sect. 31, Mad. Reg. I. of 1803, Sect. 40, Mad. Reg. II. of 1803, Sect. 64, and Beng. Reg. II. of 1793, Sect. 18; Judges and Officers of the Presidency Court of Small Causes, Act. XV. of 1882, Sect. 15; Officers of the High Court and Insolvent Court, Act XV. of 1848, Sects. 1 to 3.

PRETENDING TO BE A PUBLIC SERVANT.

Sect. 170. *Personating a Public Servant.*—**Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Sect. 171. *Wearing Garb of Public Servant.*—**Whoever, not belonging to a certain class of public servants, wears any garb, or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred Rupees, or with both.**

Triable by any Magistrate. Police officers may arrest without a warrant. Defendants are bailable. A warrant should issue in the first instance under Sect. 170, *and a summons under Sect.* 171. *Not compoundable.*

Evidence.

The remarks on Sect. 140, p. 149, are also applicable to Sect. 171. If property be obtained by means of the assumed garb, it will be cheating, although nothing pass in words; *R.* v. *Barnard*, 7 *C. and P.* 784; and the same will be the result if a person committing an offence under Sect. 170 obtains any property, or otherwise brings his acts within the definition of cheating.

CHAPTER X.

OF CONTEMPT OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

DISOBEDIENCE TO SUMMONS, &c.

Sect. 172. *Absconding to avoid Service of Summons.*—**Whoever absconds in order to avoid being served with a summons, notice, or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice, or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both; or if the summons, notice, or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees or with both.**

Sect. 173. *Preventing Service of Summons.*—**Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice, or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice, or order, or intentionally prevents the lawful affixing to any place of any such summons, notice, or order, or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed, or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or**

with both; or, if the summons, notice, order, or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Sect. 174. *Non-attendance in obedience to an Order from a Public Servant.*—Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both; or if the summons, notice, order, or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Illustrations.

(*a*) A, being legally bound to appear before the Supreme Court at Calcutta, in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(*b*) A, being legally bound to appear before a Zillah Judge, as a witness, in obedience to a summons issued by that Zillah Judge, intentionally omits to appear. A has committed the offence defined in this section.

Sect. 175. *Omission to produce a Document.*—**Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both; or if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Illustration.

A, being legally bound to produce a document before a Zillah Court, intentionally omits to produce the same. A has committed the offence defined in this section.

Offences under Sects. 173 *and* 175 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class, except under Sect.* 175, *in cases where the offence is committed in a Court, and then by that Court, subject to the provisions of Chap. XXXV., Cr. P. C.,* 1882; *offences under Sects.* 172 *and* 174 *are triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 195 (*a*), *Cr. P. C.,* 1882.

Charge of Absconding.

That you, the said A B, on or about the day of , at , did abscond in order to avoid being served with a summons, to wit, to attend at , on the day of , proceeding from a public servant, legally competent as such public servant to issue such summons, to wit, the Magistrate of the District of ; and that you, the said A B, have thereby committed an offence punishable under Sect. 172 of the Indian Penal Code, and within, &c.

Evidence.

Under Sect. 172 a question might arise, whether a person hearing that a summons was about to be applied for against him, and absconding before it was issued, would be guilty of an offence. Looking, however, to the fact that the absconding is an offence because it is a contempt of the lawful authority of a public servant, which of course cannot be contemned until it has been exercised, and also taking into consideration the words of the latter half of the section, the most reasonable construction is, that there must be some judicial action on the part of the public servant before this offence can be committed, such as an application to him for the issue of a summons, which he has granted; and it has been decided in Madras, in conformity with the foregoing opinion, that to abscond, in order to avoid service of a summons which has not been issued, is not an offence under this section, but that it must be shown that a summons, notice, or order has actually been issued, and that the accused knew or had reason to believe that this was the case; *Madapusi Srinivasa* v. *Reg. I. L. R.* 4 *Mad.* 393. As to the latter point, see also *Reg.* v. *Ramtoonoo Singh*, 12 *W. R. Cr.* 49. Absconding does not necessarily imply change of place, but may be effected by concealment. If a person conceals himself before process issues and remains concealed after it has issued, he absconds; *Madapusi Srinivasa* v. *Reg. ubi sup.*

The statement by a magistrate that a summons might issue has been held equivalent to its actual issue, as far as respects an application, which must be made within a certain time in order to be acted on afterwards; *Potts* v. *Cumbridge*, 27 *L. J. N. S. M. C.* 62.

A warrant is neither a summons, notice, or order under this section, as it is addressed to the officer who has to execute it, and not to the person whose attendance is required; *Reg.* v. *Womesh Chunder*, 5 *W. R. Cr.* 71; and absconding to avoid arrest does not come under Sect. 172; *Emp.* v. *Lakshmi*, *B. R.* 24th *February* 1881. See also *Reg.* v. *Zahoor*, 4 *N. W. R.* 97.

Under Sect. 173 the summons must have issued, and be about to be served, or the proclamation must be about to be made, in order to the commission of an offence, or else the summons, if not to be served personally, must be about to be affixed to some lawful

place. In these cases the intentional nature of the act charged will be inferred from the act itself, and the mode in which it is done. The refusal by an accused person to sign a summons intended to be served upon him, does not constitute the offence of intentionally preventing the service of a summons on himself; *Reg.* v. *Kalya*, 5 *Bom. H. C. Rep. C. C.* 34; followed in *In re Bhoobuneshwar*, *I. L. R.* 3 *Calc.* 621. The refusal to receive a summons is not a preventing of the service of the summons, for if it be tendered and refused, the service is good; *Reg.* v. *Khusal Purbhudas*, *B. R.* 15*th July* 1869; *Reg.* v. *Punamalai*, *I. L. R.* 5 *Mad.* 199. After service of a summons the throwing it down by an accused is no offence; *Reg.* v. *Arumuga Nadan*, *ib.* 200.

Under Sects. 174 and 175 it must be shown that a summons, notice, or order has issued from some court or public servant authorised to issue it, or that a proclamation has been made by the proper authority, commanding the defendant to appear at a certain time and place, with or without a document; *In re Shib Persad Chuckerbutty*, 17 *W. R. Cr.* 38; 7 *Mad. H. C. Rep. Cr. R.* 14, 43. Where a summons did not mention the place or the time of day at which the person summoned was required to attend, it was held that he could not be convicted under Sect. 174 for non-attendance in obedience to the summons; *Emp.* v. *Ram Saran*, *I. L. R.* 5 *All.* 7; 7 *Mad. H. C. Rep. Cr. R.* 14, 43. It must then be shown that the summons has been served upon him, or that the proclamation has come to his notice, and proof must be given that he was not present at the time and place mentioned in the summons or proclamation, or that, being present, he refused to deliver up the documents required. His omission to attend must be intentional, or his departure must be wilful; *In re Sutherland*, 14 *W. R. Cr.* 20; where a witness was summoned for a particular day, but, not being at home, did not receive or hear of the summons till after that day, it was held that he could not be fined for non-attendance, because he did not afterwards appear and state his reason for non-attendance; *Reg.* v. *Ungun Lall*, 1 *N. W. Ed.* 1873, 303; but if it is proved that a summons was served upon him, and that he understood it, and knew when and where to attend, his absence will be inferred by the court to be intentional, unless and until he can show it was accidental, or

unless the circumstances adduced in evidence themselves show it to be such; but the court in these cases ought not to be hasty in drawing an inference unfavourable to the accused, but to search for facts from which the intentional absence may be positively inferred. The accused was summoned by a magistrate to appear on a certain day at 10 A.M. to answer a criminal charge, and attended at the proper time, but not finding the Magistrate in Court, waited a few minutes only and then left, posting up a notice on the wall of the Court stating that he had attended in Court, and giving the reason for his leaving. The Magistrate, who had been engaged in other public business, took his seat at 11, and the defendant, not answering then to his name, was prosecuted and convicted under this section. The defendant contended that he had obeyed the summons, as it did not direct him not to depart without the leave of the Court, but it was held that the purpose of the attendance was not fulfilled until the charge was answered, and that, as the accused had not waited a reasonable time, he was rightly convicted; *Emp.* v. *Kisan Bapu, I. L. R.* 10 *Bom.* 93. This case differs from *In re Sutherland,* 14 *W. R. Cr.* 20, in the time during which the defendant waited. In the case of a refusal or omission to produce a document, he must have been served with a *subpœnâ duces tecum* to produce that document, or else be in court with the document in his possession, and must in either case be asked for it, and his refusal to produce it, or his not accounting for its non-production, will be evidence of intentional omission. It must also be shown that the document was one which he was legally bound to *produce* in court, for although there are many documents which a witness is bound to produce in court for the court to examine, if necessary, and determine whether they ought to be delivered up or shown to the party requiring their production, yet there are others, such as state documents, which the court has no right to inspect, but must accept their description from the officer who has the custody of them. If the case be one of a person who is bound by any general law to deliver any document or class of documents to a public servant, the mere omission to conform to the requirements of the law may amount to an intentional omission, but the surrounding circumstances must be very

strong to justify a conviction, without a previous demand on the part of the person to whom it is to be delivered.

Under the old Code it was held that the mere showing of a summons to a witness is not a sufficient service; the original should be left with him, or else shown to him, and a copy left with him; *Reg.* v. *Karsanlal Davatram*, 5 *Bom. H. C. Rep. C. C.* 20. For the rules for the service of a summons at present in force, see Sects. 68 to 70, Cr. P. Code, 1882. Even although in an act there may be no provision for an original and duplicate summons, and that the latter should be left with the person summoned, yet the summons should be left with, and not merely shewn to, the person on whom it is to be served and then taken away; *In re Kuppan*, *I. L. R.* 11 *Mad.* 137. A witness was summoned to attend on a certain day to give evidence before the judge of a Small Causes Court; but before that day the case was postponed, and no fresh summons or notification of postponement was served upon the witness; consequently, he did not attend when the case was heard, and was fined; but it was held that, not having been re-summoned, the witness was not bound to attend; *In re Sreenath Ghose*, 10 *W. R. Cr.* 33. The accused was summoned as a witness in a case to be heard on the 27th May. The summons was not served personally on the accused, but affixed to the door of his house. On the appointed day the case was not taken up, but was adjourned by public proclamation till the 5th June, and on this latter day the accused failed to attend. There was no evidence that the summons had been brought to the knowledge of the defendant, so as to require him to attend on the first occasion, and it was held that there was no evidence of the commission of an offence under Sect. 174. It was also held that the adjournment of a case by proclamation is irregular, and that a magistrate ought to give special notice to the parties of the date to which a case is adjourned; 6 *Mad. H. C. Rep. App.* 29. A verbal order, however, given to a person in court to attend on a subsequent day is sufficient; *Reg.* v. *Guman Parthan*, *B. R.* 12*th June* 1873; 5 *Mad. H. C. Rep. App.* 15; and so is the verbal order of a Village Magistrate in Madras, although no process has previously been issued for the person's attendance; 7 *Mad. H. C. Rep. App.* 3.

If the summons be to attend *either* in person *or* by agent, greater care will be necessary in proving the intentional omission, as the party summoned may have instructed an agent, and the agent may have omitted to attend; and if an inferior servant of a court be refused permission to attend in answer to the summons of another court, that is not an intentional disobedience; *In re Sreenath Ghose, ubi sup.*

Sect. 174 does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a civil court; *Reg.* v. *Sirda Pathoo*, 1 *Bom. H. C. Rep.* 38. Disobedience to a proclamation would be punishable under this section; 1 *R. C. C. Cr.* 61; and an accused person who has forfeited his bail bond may be proceeded against under this section, although his sureties have paid the amount of their recognisances; *Reg.* v. *Tajmuddy Lahoree*, 10 *W. R. Cr.* 4.

A magistrate may take cognisance of an offence under Sect. 174 committed against his own court; *Reg.* v. *Gugun Misser*, 8 *W. R. Cr.* 61. But a *Mahalkari*, invested with the powers of a second-class subordinate magistrate, cannot issue a summons under Sect. 8 of Act XI. of 1843; and therefore a person cannot be convicted under Sect. 174 of the Penal Code for having disobeyed a summons so issued; *Reg.* v. *Venkaji Bhaskar*, 8 *Bom. H. C. Rep. C. C.* 19. Further, the chairman of a municipal commission, appointed under Act XXVI. of 1850, although a public servant, is not legally competent, as such, to issue an order for attendance before himself; consequently, the disobedience of such an order is not an offence under this section; *Reg.* v. *Purshotam Valji*, 5 *Bom. H. C. Rep. C. C.* 33. In certain cases, however, the municipal authorities may issue summonses, disobedience to which is punishable under one or other of these sections; see Mad. Act V. of 1878, s. 165; Bom. Act III. of 1872, s. 112.

By the Criminal Tribes Act, 1871, Act XXVII. of 1871, Sect. 9, any member of any such tribe, gang, or class who, without lawful excuse, the burden of proving which shall lie upon him, shall fail to appear according to such notice as is provided in the Act, or who shall intentionally omit to furnish such information as is provided for by that Act, or who shall furnish, as true, information

on the subject which he knows, or has reason to believe, to be false, shall be deemed guilty under the first parts of Sects. 174, or 176, or 177 of the Indian Penal Code respectively, as the case may be.

A person disobeying the summons of a Coroner to attend and give evidence is guilty of an offence under Sect. 174; Act IV. of 1871, Sect. 17. A person failing to attend before the Collector in respect of land he is about to acquire is guilty of an offence under Sect. 175; Act X. of 1870, Sect. 10.

OMISSION TO GIVE INFORMATION, &C.

Sect. 176. *Omission to give Notice or Information.*—**Whoever, being legally bound to give any notice, or to furnish any information on any subject to any public servant, as such, intentionally omits to give such notice, or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both; or if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Sect. 177. *Furnishing False Information.*—**Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows, or has reason to believe, to be false, shall be punished with simple imprisoment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both; or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or**

in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*a*) **A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.**

(*b*) **A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound under Clause 5, Sect. 7, Regulation III., 1821, of the Bengal Code, to give early and punctual information of the above fact to the nearest police station, wilfully misinforms the police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in this section.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Evidence.

These sections only apply to persons upon whom by law an obligation is imposed to furnish certain information to public servants, and who *intentionally* commit a breach of such obligation;

In re Phool Chund, 16 *W. R. Cr.* 35; but they should not be put in force if the public servants have already obtained the information from other sources; *Emp.* v. *Sashi Bhusan*, *I. L. R.* 4 *Calc.* 623; *In re Pandya*, *I. L. R.* 7 *Mad.* 436. The legal obligation to furnish information arises under various Acts relating to the public revenue, as, for instance, the Income-Tax Act, which requires returns to be made, information to be furnished, &c. So also the Registration Act provides that every person shall be legally bound to furnish information as to the execution, &c., of documents tendered for registration to the registering officer when required so to do. Other laws also require persons to give notice of various matters to public servants. Sect. 44 of the Criminal Procedure Code, 1882, for instance, requires all persons to give information of certain offences there specified. Such laws as those last mentioned will often be found to be excepted from the operation of the Penal Code by the fifth section, as being special or local laws in which provision is made for the punishment of infractions of their provisions.

Under Sect. 277 of the Indian Succession Act, and Sect. 98 of the Probate and Administration Act, 1881, as amended by Act VI. of 1889, Sects. 7 and 15, an executor or administrator who intentionally omits to exhibit an inventory or account of the assets of the estate come to his hands, on being required so to do by the Court, commits an offence under this section.

The latter portion of these two sections, 176 and 177, may include many acts which are similar to those provided for by Sects. 118-120, pp. 129-131.

In order to support a conviction under Sect. 176 against a person for not giving information of an occurrence falling within the provisions of Sect. 45, cl. (*d*) of the Criminal Procedure Code, 1882, it is not necessary to show that the death actually occurred on his land, when the circumstances disclosed show that a dead body was found on the land of the accused under circumstances denoting that the death in all probability was sudden, unnatural, or suspicious, the finding of the body on the land being a circumstance from which the court was justified in inferring that the death took place there; *Matuki Misser* v. *Emp.*, *I. L. R.* 11 *Calc.* 619. A village moonsif is bound by Sect. 12 of Reg. XI. of 1816,

which provides that "heads of villages shall reciprocally communicate any information which they may receive of offences committed; . . . and shall co-operate in all things for the apprehension of the offenders, and the general security of the country"; and is therefore bound to report all offences although not enumerated in Sect. 89 of the Criminal Procedure Code; 3 *Mad. H. C. Rep. App.* 3, 2 *Mad. Jur.* 289. The owner or occupier of a house in a village is not bound under Sect. 45, *Cr. P. C.*, to report the occurrence therein of any sudden death; *Emp.* v. *Achutha, I. L. R.* 12 *Bom.* 92.

When a charge is made of neglect to inform the police of the presence of a proclaimed offender, it must be proved that the offender was actually proclaimed, and that the proclamation came to the knowledge of the accused; *In re Pandya, I. L. R.* 7 *Mad.* 436.

A karnam is a private person in respect of Sect. 176 and Sect. 202, there being no law binding him in any special way to report or prevent crime; he is therefore not punishable for not reporting the commission of a crime not enumerated in that section of the Criminal Procedure Code before mentioned; 3 *Mad. H. C. Rep. App.* 31, 2 *Mad. Jur.* 289. Sect. 177 does not apply to the case of *any person* who, examined by a police officer, makes a false statement, but only to cases where, by law, landholders or village watchmen are bound to give information, and to other analogous cases; *Reg.* v. *Lukhee Singh,* 12 *W. R. Cr.* 23. Where a person, not legally bound to furnish information of an offence, falsely informs the police that such an offence has been committed, without intending to cause injury or annoyance to any particular person, he has committed no offence under Sect. 177; *Reg.* v. *Saraji Mohun, B. R.* 10*th July* 1873. Sect. 177 embraces every case in which a subordinate may seek to impose *false* information upon his superior; therefore, where certain vaccinators made false returns to their superiors, it was held that as the defendants were public servants, and part of the duties they undertook was to make true returns to their official superior, to make false returns was an offence; 6 *Mad. H. C. Rep. App.* 48. See also *In re Phool Chund,* 16 *W. R. Cr.* 35. To make a false entry in a diary kept by a Government servant and sent to his official superior in pursuance of a depart-

mental order is an offence within Sect. 177; *In re Virasami, I. L. R.* 4 *Mad.* 144. In order to bring an accused under the second branch of Sect. 177, it is necessary that the false information given should be with respect to the commission of some particular offence, and not of offences in general; *Panatulla* v. *Emp. I. L. R.* 15 *Calc.* 386; therefore, a constable whose duty it was to ascertain on his rounds whether certain notoriously bad characters were in their houses or not, falsely reported that they were, it was held that the offence fell within the first branch of this section; *ib.*

A man named Yesu gave the accused four annas with which to purchase for him (Yesu) a stamp. When the stamp-collector asked the accused for his name, he said, "Yesu," instead of giving his own name. It was held that this amounted to the offence of giving false information under Sect. 177, and was not cheating by personation; *Reg.* v. *Raghoji*, 3 *Bom. H. C. Rep. C. C.* 42. This decision was under the Stamp Act, 1862, which required the stamp vendor to write the name of the purchaser on the back of the stamp, though it did not require the purchaser to give his own name. The Stamp Act, 1879, does not contain a similar provision, consequently it has since been held that, the purchaser of a stamped paper, not being bound by any law or rule having the force of law to furnish information to the stamp vendor, is not punishable under Sect. 177, if he gives a false name; *In re Paramaya, B. R.* 19*th February* 1885. A certain person attempted to get himself admitted into the police of a district by giving certain information, which he knew to be false, to the District Superintendent of Police; it was held that he had not committed an offence under Sect. 177; *Emp.* v. *Dwarka Persad, I. L. R.* 6 *All.* 97.

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law, provided that the thing punishable under such special or local law is punishable with imprisonment for six months or upwards, whether with or without fine; *Sect.* 40.

See *ante*, p. 192, for a note on the Criminal Tribes Act. A eunuch refusing to give information or giving false information as to his property is punishable under these sections; Act XXVII. of 1871, Sect. 30.

REFUSING TO TAKE OATH, &c.

Sect. 178. *Refusing to take Oath.*—**Whoever refuses to bind himself by an oath to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Sect. 179. *Refusal to answer Questions.*—**Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Sect. 180. *Refusal to sign Statement.*—**Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.**

Triable by the Court in which the offence is committed, subject to the provisions of Chap. XXXV. *of the Criminal Procedure Code,* 1882, *or if not committed in a Court, by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 195, *Cr. P. C.* 1882.

Charge.

Refusal to take Oath.

That you, on or about the day of , at , having been required to bind yourself by an oath to state the truth by , a public servant legally competent to require

you so to bind yourself, did refuse so to bind yourself; and that you have thereby committed an offence punishable under Sect. 178 of the Indian Penal Code, and within, &c.

Refusal to answer Questions.

That you, on or about the day of , at , being legally bound to state the truth on a certain subject, to wit, , to a certain public servant, to wit, , did refuse to answer a certain question demanded of you by such public servant in the exercise of the legal powers of such public servant; and that you have hereby committed an offence punishable under Sect. 179 of the Indian Penal Code, and within, &c.

Evidence.

Prove the tendering of the oath, the demand of the question, or the requirement of the signature, as the case may be. The mere omission on the part of any person to do any one of these acts is not punishable; there must have been a positive refusal, which necessitates a previous demand, before a conviction can take place. The power of a public servant to require the doing of such acts is fixed by public authority, and will therefore, in most cases, be a matter of which the court will take judicial notice.

Under Sect. 165 of the Indian Evidence Act, 1872, a judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of relevant facts. Where, however, an irrelevant question is asked, not with that object, but with a view to a subsequent criminal proceeding against the person asked, and he objects to answer it, the objection is reasonable, and he cannot be convicted under this section; *Emp.* v. *Hari Lakshman*, *I. L. R.* 10 *Bom.* 185. See also *In re Ganesh Narayen*, *I. L. R.* 13 *Bom.* 600.

A refusal by an accused person to sign a statement made by him in answer to questions put by the Court does not come under Sect. 180; *Emp.* v. *Virsapa*, *I. L. R.* 4 *Bom.* 15.

Persons refusing to give evidence under the Public Gambling Act, are punishable under Sects. 178 and 179; Act III. of 1869, Sect. 10. A witness at a Coroner's inquisition refusing to sign his deposition is punishable under Sect. 180; Act IV. of 1871, Sect. 20; but not a witness refusing to sign a deposition in any other case; 6 *Mad. H. C. Rep. App.* 14.

It is provided by the Indian Oaths Act, 1873 that Sect. 178 is to be read as if the words "or affirmation" were inserted after the word "oath."

FALSE STATEMENT ON OATH.

Sect. 181. *False Statement on Oath.*—**Whoever, being legally bound by an oath to state the truth on any subject to any public servant or other person authorised by law to administer such oath, makes to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false, or does not know to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.**

Triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.* 1882.

Charge.

That you, on or about the day of , at , being legally bound by an oath to state the truth on a certain subject, to wit, , to a public servant (*or* person) authorised by law to administer such oath, to wit, , did make to such public servant (*or* person) as aforesaid, touching that subject, a statement which was false, and which you knew at the time you so made it to be false, to wit, ; and that you have thereby committed an offence punishable under Sect. 181 of the Indian Penal Code, and within, &c.

Evidence.

The evidence under this section will be the same as that under Sect. 193, except that the false statement must be made in the course of proceedings other than judicial proceedings; *Reg.* v. *Balaram*, 7 *W. R. Cr.* 104. The word oath is defined in Sect. 51,

p. 37. The Oaths Act, 1873, provides that this section is to be read as if the words "or affirmation" were inserted after the word "oath."

A person is not legally bound to state the truth, where the officer who administers the oath is trying a case wholly beyond his jurisdiction; *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438; *Emp.* v. *Niaz Ali*, *I. L. R.* 5 *All.* 17. Nor is a person bound by law to state the truth when before an officer who, although empowered to conduct an enquiry, is not empowered to administer an oath to that person. A pleader whose conduct was being enquired into under the Legal Practitioners Act, ought not to be called upon to make a statement on solemn affirmation, but if he does so make any statement he cannot be convicted under this section, if he states what is untrue; *Kotha Subba* v. *Reg. I. L. R.* 6 *Mad.* 252.

Where a false statement is made in a stage of a judicial proceeding, the accused ought not to be convicted by a magistrate under this section, but ought to be committed for trial to the Court of Session, and a conviction under this section is illegal; *Reg.* v. *Nusurooddeen*, 11 *W. R. Cr.* 24; *Reg.* v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21. See also *In re Nuthoo Kumall*, *ib.* 22; and *Reg.* v. *Heeramun*, 8 *W. R. Cr.* 30. The High Court at Madras, however, on the 4th November 1868, ruled that a conviction under this section was good, although the offence fell under Sect. 193, 4 *Mad. H. C. Rep. App.* 18.

The making of a false return on oath of a service of a summons comes under Sect. 193, and not under this section; *Reg.* v. *Shama Churn*, 8 *W. R. Cr.* 27: so does also a false statement made on solemn affirmation before an Income-Tax Commissioner, as it is a statement in a judicial proceeding under the Income-Tax Act, 1870; *Reg.* v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21.

A sentence under this section which awards no imprisonment is illegal; 4 *Mad. H. C. Rep. App.* 18.

FALSE INFORMATION.

Sect. 182. *False Information with Intent to cause Injury.*— **Whoever gives to any public servant any information which he knows or believes to be false, intending thereby**

to cause, or knowing it to be likely that he will thereby cause, such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Illustrations.

(*a*) **A** informs a magistrate that **Z**, a police officer, subordinate to such magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the magistrate to dismiss **Z**. **A** has committed the offence defined in this section.

(*b*) **A** falsely informs a public servant that **Z** has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of **Z**'s premises, attended with annoyance to **Z**. **A** has committed the offence defined in this section.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.* 1882.

Evidence.

The fact that the accused gave the information must first be proved, then that he knew or believed that such information was false, and, if the charge is under the first part of the section that he gave the information to a public servant, intending that public servant in consequence of the information so given him

should act officially to the injury or annoyance of some third person. It will be necessary to prove that the accused intended his information to cause the public servant to act *directly* against the third person; *In re Goolam Ahmed Kazi, I. L. R.* 14 *Calc.* 314. It will not be sufficient if the public servant misinformed is only competent to pass on the information to his superior, but cannot act directly or immediately against the person informed against; *Reg.* v. *Periannam, I. L. R.* 4 *Mad.* 241. M falsely informed the collector of a district that certain zamindars had usurped possession of certain land belonging to Government. It was held that inasmuch as that was no more than an expression of a private person's opinion that the collector might, if he chose, sustain a civil suit against the zamindars, and as the result, had the collector agreed with the informant, would not have been that the collector would have used his lawful power as collector or magistrate to the injury of such zamindars, M had not committed any offence under this section; *Emp.* v. *Madho, I. L. R.* 4 *All.* 498. Where a person attempted to obtain his recruitment in the police by giving certain false information about himself to the District Superintendent, it was held that he had not committed any offence under this section; *Emp.* v. *Dwarka Prasad, I. L. R.* 6 *All.* 97.

Where a person, not legally bound to furnish information of an offence, falsely informs the police that such an offence has been committed, but without intending to cause injury or annoyance to any particular person, he has not committed any offence under this section; *Reg.* v. *Suraji Mohan, B. R.* 10*th July* 1873; *In re Goolam Ahmed Kazi, I. L. R.* 14 *Calc.* 314.

It was not intended by the Legislature that the provisions of this section should be enforced merely at the instance of private persons, consequently, where A, out of malice to B, gives to C, a public servant, false information, intended to injure B, a public servant under C, B cannot prosecute A criminally without C's consent; *In re Moulvy Mahomed Abdool Luteef*, 5. *R. C. C. Cr.* 37, and 9 *W. R. Cr.* 31; but if C's consent to the prosecution be given, then B can prosecute; *Emp.* v. *Jugal Kishore, I. L. R.* 8 *All.* 382; the right to prosecute is not confined to the person to whom the complaint is made as ruled in *Emp.* v. *Radhakishen, I. L. R.*

5 *All.* 36. It is not necessary to get any sanction if the complaint is made by the public servant to whom the false information was given; *Poonit Singh* v. *Madho Bhut, I. L. R.* 13 *Calc.* 270. See also the notes to Sect. 211, *post.*

False information of the kind referred to in this section, if given to a person who is not a public servant, is defamation; *Emp.* v. *Santaram, B. R. 12th January* 1887.

If false statements are made at the same time about more than one person, the accused should only be charged with one offence, and not with separate offences in respect of each person he names; *Poonit Singh* v. *Madho Bhut, ubi sup.*

If the charge be under the latter part of the section, it is sufficient to shew that the accused intended that the public servant should do or omit to do something which he ought not to do or omit to do if the true facts were known to him. Thus, where the first prisoner informed the Assistant Collector that he had passed a certain examination, intending to induce the Assistant Collector to give him an appointment; and the second prisoner had passed the exmination in the name of the first, and handed to him the certificate of the fact; it was held that the case fell under this section; *Emp.* v. *Ganesh, I. L. R.* 13 *Bom.* 506; in which the case of *In re Goolam Ahmed, I. L. R.* 14 *Calc.* 314, is discussed and dissented from, in so far as it rules that, under the second part of this section, the act or omission of the public servants must be in respect of a third person: but see also *Emp.* v. *Dwarka Prasad, I. L. R.* 6 *All.* 97.

OBSTRUCTION OF AND OMISSION TO ASSIST PUBLIC SERVANT.

Sect. 183. *Resistance to the taking of Property by Public Servant.*—**Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Sect. 184. *Obstructing Sale of Property by Authority of a Public Servant.*—**Whoever intentionally obstructs any sale of**

property offered for sale by the lawful authority of any public servant as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both.

Sect. 185. *Illegal Purchase or Bid for Property.*—Whoever, at any sale of property held by the lawful authority of a public servant as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property, not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both.

Sect. 186. *Obstructing Public Servant in Discharge of his Public Functions.*—Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

Sect. 187. *Omission to assist Public Servant.*—Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both; and if such assistance be demanded of him by a public servant, legally competent to make such demand, for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be

punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred Rupees, or with both.

Triable by a Presidency Magistrate, or Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.* 1882.

Evidence.

Resistance to the taking of any property by a public servant is only punishable when the taking is by lawful authority, and when the defendant knows or has reason to believe that the taking is by or by order of a public servant. So, in order to convict a person of obstructing a public servant, it must be shewn that he was in the exercise of his public functions and justified in the act which he was doing. But it must be remembered that there is no right of private defence against an act which does not reasonably cause fear of death or grievous hurt, done by a public servant acting in good faith, although the act may not be strictly justifiable by law; see *Reg.* v. *Vyankatrav*, 7 *Bom. H. C. Rep. C. C.* 50; but this does not extend to a case where an act or order is entirely *ultra vires*, and therefore illegal; *Emp.* v. *Tulsiram*, *I. L. R.* 13 *Bom.* 168. The mere refusal by a person to hand over to a bailiff money alleged to be in his pocket is not resistance to the taking of the money, under Sect. 183; *Emp.* v. *Alibhai*, *B. R.* 27*th September* 1888.

An obstruction to be an offence must have been caused voluntarily within the definition contained in Sect. 39, *ante*, p. 35. Escaping from custody is not obstructing a public servant in the discharge of his public functions under Sect. 186; *Reg.* v. *Poshu*, 2 *Bom. H. C. Rep.* 134. Where a measuring clerk employed under the Revenue Survey went to the shop of the accused and said he wanted to measure his house, and the accused said he could not go with him then, that he did not want his house measured, but that if he liked to call in the morning when he was at his house, he would allow him to measure it; it was held that the refusal to go with the clerk was not causing an obstruction; *Reg.* v. *Bhagtidas*, 5 *Bom. H. C. Rep. Cr.* 51.

The resistance of the process of a civil court is punishable under Sect. 186 by a court of criminal jurisdiction; *Reg.* v. *Bhagai Dafadar*, 2 *Ben. L. R. F. B.* 21, and 10 *W. R. Cr.* 43; overruling *Reg.* v. *Chandra Kant*, 9 *W. R. Cr.* 63, in which it had been held that a Magistrate had not jurisdiction to fine for resistance to the process of a civil court, but the civil court only. The case of *Reg.* v. *Bhagai Dafadar* has been followed in that of *In re Mani Chandra*, 2 *Ben. L. R. A. C. J.* 188. If a bailiff break the doors of a third person to execute a decree against a judgment debtor he is a trespasser, if it turn out that neither the person nor the goods of the debtor are in the house, and, under such circumstances, the owner of the house does not, by obstructing the bailiff, render himself liable to punishment under Sect. 183 or 186; *Reg.* v. *Gazi*, 7 *Bom. H. C. Rep. C. C.* 83. Nor is a cart-owner liable under Sect. 186 for refusing to give his cart on hire to a Government officer; *Reg.* v. *Dhori Kullan*, 9 *Bom. H. C. Rep.* 165. A magistrate directed a landholder "to find a clue" in a case of theft within five days, and to assist the police; it was held that such order was not authorized by Act X. of 1872, Sects. 90 and 91, and that the conviction of the landholder under Sects. 187 and 188 of this Code was not sustainable; *Emp.* v. *Bakshi Ram*, *I. L. R.* 3 *All.* 201.

Where a Mamlutdar, not being able to execute a decree for possession in consequence of both parties being found to be in joint possession of the land in dispute which did not correspond to the description given in the plaint, referred the matter to the Collector for advice, and the Collector sent a surveyor to measure the land, and, after ascertaining the respective shares of the parties, to put the decree-holder in possession of his share; it was held that the action of the Collector was altogether *ultra vires*, and that the defendant could not be prosecuted, under Sect. 186, for preventing the surveyor from measuring the land; *Emp.* v. *Tulsiram*, *I. L. R.* 13 *Bom.* 168.

A Municipal servant is not discharging a public function in putting down pegs and strings to mark out a road, unless the road is public property vested in the Municipality; and if there is a *bonâ fide* dispute between any person and the Municipality as to the ownership of the road, that person does not commit an offence under Sect. 186 by pulling up the pegs and cutting the strings; *Emp.* v. *Sagun*, *B. R.* 5*th April* 1888.

A person obstructing an officer in execution of his duty under the Foreigner's Act is punishable under Sect. 186; *Act* III. *of* 1864, *Sect.* 3.

Public servants unlawfully buying or bidding for property are punishable under Sect. 169. A mock bidding for a lease of a ferry, put up for sale by auction by a magistrate, has been held to come under Sect. 185; 5 *R. J. and P.* 38.

Quære, whether a mouzadar is a public servant; *Reg. v. Soorjaram*, 8 *W. R. Cr.* 66. An officer executing the warrant of a Marine Court is a public servant within the meaning of Sect. 186; *Act* IV. *of* 1875, *Sect.* 15.

Assaulting or causing hurt to a public servant in the discharge of his duty is punished by Sect. 152; threatening a public servant, by Sect. 189; and insulting or interrupting him in a judicial proceeding, by Sect. 228.

Persons bound to furnish information to public servants, and not doing so, bring themselves within Sects. 176, 177.

The word "offence" in Sect. 187, denotes anything punishable under the Penal Code or under any special or local law; *Sect.* 40.

A person refusing to perform the duties of census officer is punishable under Sect. 187; *Act* XIV. *of* 1880, *Sect.* 5.

Disobedience of Order of Public Servant.

Sect. 188. *Disobedience to an Order duly promulgated by a Public Servant.*—**Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both; and if such disobedience causes or tends to cause danger to**

human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Explanation.—**It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.**

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.* 1882.

Evidence.

The first fact to be proved is that an order has been issued against the defendant, which he is in law bound to obey; and for that, it must be issued by a public servant, it must be one which that servant was competent to issue, and there must be no flaw in the order itself or in the mode of its issue, for disobedience of an order promulgated by a public servant having no authority in that behalf is not an offence under this section; *In re Surjanarain Dass*, I. L. R. 6 *Calc.* 88. Thus under Bombay Act V. of 1864 a mamlatdar has no power to order a defendant not to allow water from his house to fall on his neighbour's premises; *Reg.* v. *Bhau Vithu*, 3 *Bom. H. C. Rep. C. C.* 53; nor to direct a person to keep a gateway open; *Reg.* v. *Khandoji Tanaji*, 5 *Bom. H. C. Rep. C. C.*

21; but he has jurisdiction to order a door to be broken open if that is necessary to give possession of property; *Baji Dev* v. *Sadashiv Bhaishankar*, 5 *Bom. H. C. Rep. A. C. J.* 158; and to order a person to keep open a right of way to a privy; *Reg.* v. *Krishna Shet*, 5 *Bom. H. C. Rep. C. C.* 46. A magistrate can order the priests of a temple to widen and heighten the doorway so as to obviate the dangers arising from the crowds of pilgrims which frequent it, and improve the ventilation; *Reg.* v. *Ram Chandra*, 6 *Bom. H. C. Rep. Cr.* 36; but he has no power to issue a general order prohibiting the public from frequenting the roads and public places of resort between the hours of 9 P.M. and sunrise; *In re Komul Kisto Bonick*, 12 *C. L. R.* 231; see, also, *Emp.* v. *Suckoo*, *B. R.* 18*th July* 1889; but under Beng. Reg. VI. of 1819 a magistrate may prohibit a ferry-boat being employed in the immediate vicinity of a public ferry; *Muthra* v. *Jawahir*, *I. L. R.* 1 *All.* 527. For cases of orders abating local nuisances, see *Reg.* v. *Dalsukram*, 2 *Bom. H. C. Rep.* 384; and orders for preventing a breach of the peace; *In re Surjanarain*, *I. L. R.* 6 *Calc.* 88; orders made on the report of an imperfectly constituted jury; *Emp.* v. *Bhairub Chunder*, 10 *C. L. R.* 193.

This section clearly contemplates the case of an order being made upon some particular person, and that person disobeying the order. The illustration, however, somewhat extends the section by applying it to the case of an order made against a particular class of persons, but even with this extension, it is evident that the order must be one which orders a person or a definite class of persons to do or not to do a certain act; *In re Amiraddi*, 3 *B. L. R. A. Cr.* 45; *Emp.* v. *Maneckchand*, *B. R.* 1*st September* 1887; and evidence must be given that the order was directed against the accused person or persons; *In re Nobo Kishore*, 7 *C. L. R.* 291. An order was promulgated by a magistrate in 1876, directing a religious procession to proceed by a certain specified route, and for several years subsequently, the procession, as a matter of fact, did go by that route, although no new orders were made by the magistrate in those years. In 1886, the procession went by a different route; and it was held that those who took the procession by that route could not be convicted under this section of disobeying the order of 1876, as it was only a temporary one;

Emp. v. *Sheodin, I. L. R.* 10 *All.* 115. Where a magistrate by an order prohibits the holding of a new *hât* contiguous to, and on the same day as an old *hât*, a person who frequents the new *hât*, not as proprietor or manager, but as a buyer or seller, cannot be convicted under this section; *Parbutty Charan* v. *Emp. I. L. R.* 16 *Calc.* 9. In this case the point as to whether such an order was legal or not does not seem to have been raised. An order that, owing to the prevalence of cholera, the inhabitants of a town should not give caste dinners was posted in several parts of the town, including the street in which the accused lived, and was also read out in the town. Subsequently, the accused gave a caste dinner and was convicted under this section; but the conviction was held to be illegal as Sect. 144 Cr. P. C. was confined to giving a direction that a particular person should abstain from acts of a certain character, or that the public should abstain from certain acts when frequenting certain places; and further that this order was not addressed to the accused, nor brought directly to his notice; *Emp.* v. *Lakhmidas, B. R.* 25*th July* 1889; see, also, *Emp.* v. *Harilal, B. R.* 30*th July* 1889. An order under this section is only binding upon the parties to it; consequently where an order was made as between A and B and three persons then tenants of B, it was held that it was not binding upon subsequent tenants of B; *In re Gopal Burnawar,* 3 *B. L. R. A. Cr.* 13.

If the order was one which had to be promulgated, it must be shewn that it was promulgated by a public servant lawfully empowered to promulgate it; *Reg.* v. *Subun Singh,* 23 *W. R. Cr.* 57. It must also be shewn that the accused knew that an order had been promulgated by a public servant directing such accused to abstain from a certain act; *Reg.* v. *Ramtonoo Singh,* 12 *W. R. Cr.* 49; *Muthra* v. *Jawahir, I. L. R.* 1 *All.* 527; *Emp.* v. *Lakhmidas, B. R.* 25*th July* 1889. A was declared by an order of a magistrate to be in possession of a certain land, and B and all others were ordered not to interfere with A's possession. Subsequently B, and an assignee of his, and some of B's servants interfered with A, and attempted to oust him from possession, all being aware of the orders of the magistrate; it was held that all the accused could be rightly convicted under this section; *Goluck Chandra* v. *Kali Charan, I. L. R.* 13 *Calc.* 175.

Evidence must also be produced to shew that the disobedience has caused, or tends to cause, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to some person lawfully employed, or that it caused, or tended to cause, a riot or affray, or danger to human life, health, or safety; 4 *Mad. H. C. Rep. App.* 5; and *Reg.* v. *Nandkumar Bose*, 3 *Ben. L. R. App.* 149.

This section does not justify a magistrate in interfering with the exercise by a landholder of any of his civil rights, merely because such exercise might require vigilance on the part of the police, and might, in the absence of such vigilance, lead to an affray; and it has been held, under this section, that an order prohibiting a zamindar from holding a market upon his estate, was not a legal order; 5 *B. J. and P.* 155. In *Lalla Mitter* v. *Raj Coomar*, 18 *W. R. Cr.* 22; it was held that a magistrate could prohibit the rival owners of two neighbouring *hâts* from holding them for a limited period on certain days, where the exercise of the right would cause an affray.

The wording of this section, as to the description of punishment to be awarded to each class of offences, is so clear that one would have supposed that no magistrate could go wrong. Nevertheless, the High Court of Bombay have had to decide that rigorous imprisonment can only be awarded in cases coming within the terms of the latter part; *Reg.* v. *Ratanrav bin Mahadevrav Chavan*, 3 *Bom. H. C. Rep. C. C.* 32.

Parties to civil suits failing to comply with orders to answer interrogatories, or for discovery, production, or inspection of documents, the order for which has been personally served upon them, are punishable under this section; *Act* XIV. *of* 1882, *Sect.* 136. The High Court in Calcutta seem to have overlooked this section and decided too widely that Sect. 188 did not apply to orders made in a civil suit, though they were right in holding it did not apply to disobedience of an injunction; *In re Chandra Kanta, I. L. R.* 6 *Calc.* 445; 7 *C. L. R.* 350.

The disobedience of the order of a magistrate prohibiting a local nuisance is punishable under this section; *Act* X. *of* 1882, *Sects.* 136, 140; but such an order must be made against a definite individual, and not be merely a general proclamation, in order that disobedience to such an order may fall under this section; *Emp.* v. *Manekchand, B. R. 1st September* 1887.

THREAT OF INJURY TO PUBLIC SERVANT, &c.

Sect. 189. *Threat of Injury to a Public Servant.*—**Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested for the purpose of inducing that public servant to do any act or to forbear or delay to do any act connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Sect. 190. *Threat of Injury to any other Person.*—**Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury, to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with both.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

The threat used ought to be set out with reasonable certainty in the charge, in order to afford the prisoner the opportunity of properly answering it; and it is further necessary that the words used in making the alleged threat should be strictly proved, in order that the Court may be able to judge whether the words used amounted to a threat, or whether they were only such a remonstrance as might be perfectly justifiable; *Emp.* v. *Maheshri Buksh, I. L. R.* 8 *All.* 380.

Where a priest, knowing that a civil suit was pending against A for the possession of certain church property, excommunicated him for withholding it; it was held not to be an offence under Sect. 190; *In re De Cruz, I. L. R.* 8 *Mad.* 140.

See also the notes to Sect. 503, which defines the offence of criminal intimidation.

CHAPTER XI.

FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

FALSE EVIDENCE.

Sect. 191. *False Evidence.*—**Whoever, being legally bound by an oath, or by any express provision of law, to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.**

Explanation 1.—**A statement is within the meaning of this section, whether it is made verbally or otherwise.**

Explanation 2.—**A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.**

Illustrations.

(*a*) **A, in support of a just claim which B has against Z for one thousand Rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.**

(*b*) **A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.**

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(*e*) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

Sect. 192. *Fabricating False Evidence.*—Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement, may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of police are likely to search. A has fabricated false evidence.

Sect. 193. *Punishment for false Evidence.*—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-Martial or before a Military Court of Requests is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an enquiry before a magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice, according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Sect. 194. *Giving, &c., False Evidence to convict of a Capital Offence.*—Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code (or by the law of England) [Act XXVII. of 1870, Sect. 7], shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Sect. 195. *Giving, &c., False Evidence to convict of Offence punishable with Transportation, &c.*—Whoever gives or fabri-

cates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by this Code (or by the law of England) [Act XXVII. of 1870, Sect. 7], is not capital but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A therefore is liable to such transportation or imprisonment, with or without fine.

Sect. 196. *Using Evidence known to be False.*—Whoever corruptly uses, or attempts to use, as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Sect. 197. *Issuing or signing a False Certificate.*—Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing, or believing, that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Sect. 198. *Using as a True Certificate one known to be False in a Material Point.*—Whoever corruptly uses, or attempts to use, any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Sect. 199. *False Statement in Declaration receivable as Evidence.*—**Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.**

Sect. 200. *Using as True any such Declaration.*—**Whoever corruptly uses, or attempts to use, as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.**

Explanation.—**A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of Sects. 199 and 200.**

Note.

By Act VI. of 1864, for a second offence under Sects. 193, 194 and 195 whipping may be added as a punishment.

Offences under Sects. 194 *and* 195 *are triable by the Court of Session; those under Sects.* 193 *and* 196-200, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should be issued in the first instance. Police officers may not arrest without a warrant. Defendants are bailable, except under Sects.* 194 *and* 195, *when they are not bailable, and under Sect.* 196, *when the question of bail depends upon whether the offence of giving the evidence referred to is bailable or not. Not compoundable. Sanction required under Sect.* 195, *Cr. P. C.* 1882, *for the prosecution of offences under Sects.* 193 *to* 196, 199 *and* 200, *when offence is committed in relation to a proceeding in any Court.*

Charge.

That you, the said A B, on the day of ing summoned as a witness in , being a judicial pr eding

then pending before the , and being bound by an oath to state the truth, intentionally gave false evidence by knowingly and falsely stating that you had seen one Mooljee sign a certain document marked A, whereas in truth, and in fact, you had not seen the said Mooljee sign the said document, and that you, the said A B, have thereby committed an offence punishable under Sect. 193 of Indian Penal Code, and within, &c.

Evidence.

In the preceding sections there are three principal heads under which offences relating to false evidence are classed—1. Giving false evidence, or using false or fabricated evidence; 2. Fabricating false evidence; 3. Issuing or making a certificate or declaration in which there is a false statement.

In charges under these sections, except under Sect. 197, if the false evidence were given at a trial, or in the course of a judicial proceeding, it must be proved that such a trial did take place, or that there was such a judicial proceeding; *Reg.* v. *Fatik Biswas*, 1 *Ben. L. R. A. Cr. J.* 13; and the charge should shew not only the judicial proceeding in which the prisoner is accused of having given false evidence, but the particular stage of the proceeding at which the evidence was given; *ib.* 15. The proper way to prove that the judicial proceeding took place is to produce the record thereof; *ib.* 15; S. C. *sub nom. Reg.* v. *Futteali Biswas*, 10 *W. R. Cr.* 37. This case was followed in *Reg.* v. *Maharaj Misser*, 7 *Ben. L. R. App.* 66, and 16 *W. R. Cr.* 47. See also *Reg.* v. *Ravji Taju*, 8 *Bom. H. C. Rep. C. C.* 37. Where a summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed, and at the trial the information was produced, but not the summons, it was held that the information was not sufficient, but that the summons ought to have been produced; *Reg.* v. *Whybrow*, 8 *Cox C. C.* 438.

So, too, where a defendant was indicted for perjury alleged to have been committed on the hearing of an affiliation summons, it was held that to support the indictment it was necessary to give evidence of the charge made by the mother either by producing the original order made thereon, or by giving secondary evidence

of the summons after notice to produce it; and that in the absence of such notice it was not sufficient to produce the minutes of the proceedings by the clerk of the justices, those minutes being of no greater authority than the notes of a shorthand writer; *Reg.* v. *Newal*, 6 *Cox C. C.* 21. On the trial of an indictment for perjury alleged to have been committed before magistrates, on the hearing of a case punishable on summary conviction, the conviction by the magistrates is not receivable in evidence, because it is irrelevant; *Reg.* v. *Goodfellow, Car. and M.* 569.

The Penal Code gives no definition of what is meant by "a stage of a judicial proceeding," but only cites a few instances. The definition of a judicial proceeding is, however, given in Sect. 4 of the Criminal Procedure Code, 1882, as a proceeding in the course of which evidence is, or may be, legally taken. Any person upon whom a duty is cast to do a certain act if certain circumstances exist, must enquire whether those circumstances do exist, but such an enquiry is not in itself a judicial enquiry or a judicial proceeding, see *Reg.* v. *Price, L. R.* 6 *Q. B.* at p. 418; in order to make an enquiry a judicial proceeding, it must be one in which the object is to determine a jural relation between one person and another, or a group of persons, or between him and the public generally; *Reg.* v. *Tulja, I. L. R.* 12 *Bom.* at p. 42. Under the English law, the following decisions have taken place as to what is false swearing in a judicial proceeding: If a defendant swear falsely when examined as a witness upon a trial or in an answer to a bill in equity; 5 *Mod.* 348; 3 *Inst.* 166; or in depositions in a court of equity; 5 *Mod.* 348; or in an affidavit in the Courts of Queen's Bench, Common Pleas, &c.; 1 *Rol. Rep.* 79, per *Coke*, C. J.; or upon a commission for the examination of witnesses; *Cro. Car.* 99; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron; 5 *Mod.* 348; 1 *Mod.* 55, *per Twisden*, J.; or ecclesiastical court; 5 *Mod.* 348; or any other court, whether of record or not; see 1 *Hawk. c.* 69, *s.* 3; also before a local marine board acting under 17 & 18 Vict. c. 104, s. 241; *Reg.* v. *Tomlinson*, 12 *Jur. N. S.* 945. An inquiry into the income of a person under the Income-Tax Act, 1870, is by that Act a judicial proceeding; *Reg.*

v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21. Sect. 235 of the Civil Procedure Code requires a decree-holder to state what payments have been made on account of his decree, and whether the same has been adjusted, even though such adjustment has not been certified to the Court; *Paupaya* v. *Narasimha*, *I. L. R.* 2 *Mad.* 216; therefore, if a judgment creditor falsely states while making application for execution that there has been no adjustment, and it turns out that there has been an adjustment out of court which has not been certified, he is guilty of giving false evidence in a stage of a judicial proceeding; *Emp.* v. *Bapuji*, *I. L. R.* 10 *Bom.* 288. A Coroner's inquest is a judicial proceeding; *Act* IV. *of* 1871, *Sect.* 8. The examination of a plaintiff in reference to the matters of his claim, is an investigation directed by law, and is, therefore, a stage of a judicial proceeding; *Reg.* v. *Mata Dyal*, 4 *N. W.* 6. An enquiry by a magistrate in order to find out the writer of an anonymous letter charging certain persons with murder, but without any reference to the truth or otherwise of the charge is not a stage of a judicial proceeding; *Reg* v. *Bykant Nath*, 5 *W. R. Cr.* 72.

The matter in which the false evidence is given must be within the jurisdiction of the person before whom it is sworn, or else it is not given in a judicial proceeding; see *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438. A statement made to, and taken down by a police constable under Sect. 161, Cr. P. C., is not in a stage of a judicial proceeding; *Emp.* v. *Ismail*, *I. L. R.* 11 *Bom.* 659; nor is one before a Third Class Magistrate under Sect. 164, Cr. P. C., in the course of a police investigation; *Emp.* v. *Bharma*, *I. L. R.* 11 *Bom.* 702. Evidence given before a police patel is not evidence given in a stage of a judicial proceeding; *Emp.* v. *Irbasapa*, *I. L. R.* 4 *Bom.* 479.

A *femme sole* having recovered judgment in a county court, afterwards married, and subsequently to her marriage issued a judgment summons out of the London Small Debts Court, within the jurisdiction of which the defendant was living. The judgment summons was headed as in the plaint note in the county court, and, objection being made on behalf of the defendant, the judge amended it by striking out the name of the original plaintiff, and substituting the names of her husband and herself as joint

plaintiffs. The defendant was then examined, and at the conclusion of his evidence the judge ordered him to be prosecuted for perjury, on which charge he was afterwards tried and found guilty. On reference to the Court of Criminal Appeal, it was held that the amendment was not within the jurisdiction of the judge, and that there being no cause in the altered name, the conviction could not be supported; *Reg.* v. *Pearce*, 9 *Jur. N. S.* 647. The accused was convicted of intentionally giving false evidence in a judicial proceeding. The proceedings at the trial at which the alleged false evidence was given were subsequently set aside in consequence of the sanction for the prosecution not being sufficient; and it was held that the conviction of the accused must be reversed, as the alleged false evidence was not given in a judicial proceeding; *Reg.* v. *Ravji Taju*, 8 *Bom. H. C. Rep. C. C.* 37. Where a magistrate illegally tenders a pardon to an accomplice, and afterwards takes his evidence in the case in which he was formerly an accused, such evidence is not given in a stage of a judicial proceeding; *Reg.* v. *Hanmunta, I. L. R.* 1 *Bom.* pp. 617, 618; *Emp.* v. *Dala Jiva, I. L. R.* 10 *Bom.* 190.

The Collector is the person authorized to make enquiries into applications for refunds for spoiled stamps, and if he delegates the enquiry to a Deputy Collector, the latter is not entitled to put the witnesses on oath, and false evidence given before him is not given in a judicial proceeding; *Emp.* v. *Niaz Ali, I. L. R.* 5 *All.* 17. Where a man died leaving some money in the hands of the telegraph authorities and P claimed it as his heir, and the matter was referred to the District Judge for investigation, it was held that the proceedings before the District Judge were not a stage of a judicial proceeding; *Emp.* v. *Chait Ram, I. L. R.* 6 *All.* 103. But a false statement on oath to the secretary of a Government Savings Bank is punishable under Sect. 193; *Act* V. *of* 1873, *Sect.* 7. A village munsif in Madras can administer an oath to a witness, and, consequently, a witness giving false evidence before him can be punished therefor; *Emp.* v. *Venkayya, I. L. R.* 11 *Mad.* 375.

Where a bankrupt has been summoned to be examined by the court, the Registrar in such case constituting the court, and has been sworn by the Registrar, but the examination took place in a room in which the Registrar was not present, the examination is

not before the court, and perjury cannot be assigned upon the evidence given in such examination; *Reg.* v. *Lloyd*, 19 *Q. B. D.* 213.

If, however, there is only an irregularity in the proceedings, the evidence is still in a judicial proceeding. Where a woman made no information on oath against the putative father of her child, and the father before the magistrate did not object to the irregularity, it was held that he could be convicted on false evidence given by him before the magistrate; *Reg.* v. *Berry*, 8 *Cox Crim. C.* 121. So, where a constable illegally brought a person before a magistrate and swore falsely against him, the illegality was held not to be a bar to the conviction of the constable; *Reg.* v. *Hughes*, 8 *Q. B. D.* 614. So, too, if an officer having authority, misconceives the basis upon which his authority rests, a person giving false evidence before him can be convicted; *Emp.* v. *Batesar*, *I. L. R.* 10 *Calc.* 604.

It must then be shewn that the accused was bound by an oath or affirmation or by some express provision of law to state the truth, or that he was bound by law to make a declaration upon some subject. Before the passing of the Oaths Act, it was held that it must be proved that the defendant was sworn, or put under an obligation to speak the truth, similar to that of an oath; or that there was some express provision of law requiring him to speak the truth. And where a witness was at the beginning of the day solemnly affirmed once for all to speak the truth in all causes coming before the court on that day, it was held that he could be convicted of giving false evidence in a suit which came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing, and the names of the cases in the day's list were not mentioned when the affirmation was administered; *Reg.* v. *Venkatachalam Pillai*, 2 *Mad. H. C. Rep.* 43. A native or other witness who professes the Christian religion must be put under the sanction of an oath upon the Holy Gospels, in order that he may be charged with the offence of giving false evidence; an affirmation under Act V. of 1840 is not sufficient, as that Act applies only to those who are Hindoos and Mahommedans, both by birth and religion; *Reg.* v. *Vedamootoo*, 4 *Mad. H. C. Rep.* 185, and 4 *Mad. Jur.* 71.

But now by Sect. 13 of the Oaths Act X. of 1873, "No omission to take any oath or make any affirmation, no substitution of any

one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, *or shall affect the obligation of a witness to state the truth.*" And it has been held by a full bench ruling at Calcutta, *Jackson*, J., dissenting that the word "omission" includes *any* omission, and is not confined simply to accidental or negligent omissions; *Reg.* v. *Sewa Bhogta*, 23 *W. R. Cr.* 12. Sect. 10 of the Oaths Act further provides that "every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations shall be bound to speak the truth." Thus it would appear that in cases where formerly it was necessary to prove the defendant had been sworn, or put under an obligation to speak the truth, such proof is now unnecessary, the above section of the Oaths Act being an express provision of law, obliging the defendant in such cases to speak the truth; but still, where the defendant has as a matter of fact been sworn or affirmed, that fact should be proved, until it has been distinctly ruled to be unnecessary.

Sects. 118 and 119 of the Cr. P. C. 1872 contained no provision requiring persons who gave information to the police to give true information, consequently, it was held that a person giving false information to the police under the provisions of those sections could not be prosecuted for giving false evidence; *Emp.* v. *Kasimkhan*, *I. L. R.* 7 *Calc.* 121; 8 *C. L. R.* 300; but Sect. 161 of the Cr. P. C. 1882 requires that such information should be true, and it has consequently been held that a person giving false answers to questions by the police under the provision of that section, commits the offence of giving false evidence in a stage of a judicial proceeding; *Emp.* v. *Parashram*, *I. L. R.* 8 *Bom.* 216; which, however, has been overruled in so far as it determines that such a statement was made in the course of a judicial proceeding; *Emp.* v. *Ismal*, *I. L. R.* 11 *Bom.* 659. See also *Nathu Sheik* v. *Emp.* *I. L. R.* 10 *Calc.* 405. It must further be proved that the information alleged to be false was given in answer to questions put by the investigating police officer, and that the officer was at the time making an investigation under Chap. XIV. *Cr. P. C.*; *Emp.* v. *Baikanta*, *I. L. R.* 16 *Calc.* 349.

A person who files a written statement in a civil suit is bound by law to state the truth; *Emp.* v. *Mehrban Singh, I. L. R.* 6 *All.* 626.

In the case of persons other than witnesses in a stage of a judicial proceeding, or those who by law are required to state the truth on a given subject, a false statement does not become false evidence merely because it is made on oath. A petition not requiring verification cannot, from the fact of its being unnecessarily verified, be made the subject of a prosecution for giving false evidence; *Reg.* v. *Kurtick Chunder*, 9 *W. R. Cr.* 58; *In re Kasi Chunder, I. L. R.* 6 *Calc.* 440. A made an application for a new trial under Sect. 21 of Act XI. of 1865, and filed a memorandum of his grounds, verified as a plaint, which is not required by the Act, and therein knowingly made a false statement; but it was held that he had not committed an offence under either Sect. 191 or 192, as the false statement was not made in the course of a judicial proceeding; *In re Haran Mandal*, 2 *Ben. L. R. A. Cr. J.* 1; and 10 *W. R. Cr.* 31. In an enquiry, under the Legal Practitioners' Act, into the conduct of a pleader, it is not competent for the court conducting the enquiry to take a statement from him on oath or solemn affirmation, consequently, the pleader cannot be charged with giving false evidence in respect of any untrue statement he may make in the course of the enquiry; *Kotha Subha Chetty* v. *Reg. I. L. R.* 6 *Mad.* 252.

To prove that the person who administered the oath had authority to do so, it is merely necessary to prove that he performed the duties of a certain office, without shewing his appointment; *R.* v. *Verelst*, 3 *Camp.* 432; and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath. A deputy magistrate has no power to administer an oath to a person making a declaration in the form of an affidavit; *In re Ishwar Chunder, I. L. R.* 14 *Calc.* 653.

The matter sworn must be proved; and it must also be proved that the defendant stated it; *Reg.* v. *Denonath Bujjur*, 9 *W. R. Cr.* 52; *Reg.* v. *Sidhoo*, 13 *W. R. Cr.* 56. If in writing, and in existence, it must be produced. Upon proof that the writing has been lost or destroyed, secondary evidence may be given of its contents, and of the defendant's signature to it; *Reg.* v. *Milnes*, 2 *F. and F.* 10. If the statement on which the prosecution is

founded was oral, the former evidence of the defendant must be proved by the testimony of some person who was present. It is sufficient for this purpose, if the witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it; *R.* v. *Rowley*, 1 *Mood, C. C.* 111; *R.* v. *Munton*, 3 *C. and P.* 498. It is not necessary to produce the judge's notes if the words spoken by the accused can be established by witnesses present at the trial; *Reg.* v. *Morgan*, 6 *Cox, C. C.* 107; for the notes of evidence taken by a judge in a trial are not admissible in evidence to prove what was said at that trial; *Reg.* v. *Child*, 5 *Cox, C. C.* 197; though any notes taken at the trial may be used to refresh the memory of the person who took them, and may also be used as corroborative evidence to support the testimony of the witness. If, however, the law requires that certain evidence should be taken down, or recorded in a particular manner, then that record ought to be in court, and be used at any rate for the purpose of refreshing the memory of the person who took it down, who is of course the fittest person to testify as to what the defendant said on the occasion. The failure of the civil court to make a note or memorandum of the evidence of the accused given before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was given in such court; *Reg.* v. *Beharee Lall Bose*, 9 *W. R. Cr.* 69. The knowledge of the Sessions Judge of the handwriting of a judicial officer, before whom a statement was alleged to have been made, which signature was attached to a deposition, is no evidence of a statement contained in that deposition having ever been made; *Reg.* v. *Fatik Biswas*, 1 *Ben. L. R. A. Cr.* 13. So, too, the evidence of a writer in the Judicial Commissioner's office, to the effect that "the document shewn to him (the deposition of the accused) is a deposition taken before the Assistant Commissioner, it appears to have been taken in due form and upon solemn affirmation, and is attested by the signature of the Assistant Commissioner," is not sufficient evidence of the prisoner having duly deposed; *Reg.* v. *Mati Khowa*, 3 *Ben. L. R. A. Cr. J.* 36, and 12 *W. R. Cr.* 31.

The whole of the evidence ought to be read, not merely the few words charged as false evidence, as it is quite possible that there may be something in another part of the evidence which materially modifies the words charged, so as to shew that they are not false. In England it has been held that if the perjury has been committed at the trial of a cause, the prosecutor must prove all the evidence given by the defendant; *Reg.* v. *Jones, Peake,* 37; or at any rate all the evidence given by the defendant referable to the fact on which the perjury is assigned; *Reg.* v. *Rowley, R. and M.* 269; unless the point upon which the perjury is assigned arose upon thedefendant's cross-examination; *Reg.* v. *Dowlin, Peake,* 170.

False evidence given in the course of a judicial proceeding need not be in respect of a material point, and therefore an indictment for giving false evidence, although it does not allege the materiality of the matter charged as false, is good if it allege sufficiently the subject-matter of the offence; *Reg.* v. *Aidrus Sahib,* 1 *Mad. H. C. Rep.* 38; *Reg.* v. *Mahomed Hossein,* 16 *W. R. Cr.* 37; *Reg.* v. *Shib Prosad Giri,* 19 *W. R. Cr.* 69; *Reg.* v. *Damodhar Ramchandra,* 5 *Bom. H. C. Rep. C. C.* 68; but the averment that he *intentionally* gave false evidence, *i.e.,* that he gave false evidence with the direct and express intention of deceiving, is very material; 2 *W. R. C. L.* 11; *Reg.* v. *Maharaj Messer,* 7 *Ben. L. R. App.* 66; and see, also, *Reg.* v. *Mahomed Hossein, ubi sup.;* and must be proved at the trial; *Reg.* v. *Denonath Bujjur,* 9 *W. R. Cr.* 52; *Reg.* v. *Sidhoo,* 13 *W. R. Cr.* 56. If, however, the evidence be proved to be false, and false to the knowledge of the accused, the intention to give false evidence will be sufficiently proved; *Reg.* v. *Amere Ali,* 3 *N. W.* 133.

Although under the Penal Code, it is not necessary that the false evidence should have been given on a material point, yet the question of materiality may have a bearing upon the question as to whether the false statement was made intentionally; for, *e.g.,* a man might be swearing truly to a very material fact, and yet unintentionally swear that the fact took place on a wrong day, where the day itself was not material. Thus, though a false statement of an immaterial fact may amount to the offence of giving false evidence, yet the immateriality of the fact may be

strong proof that the false statement was not intentional, and unless the false statement is made intentionally the offence of giving false evidence is not completed. A few of the English cases on the materiality of answers given are therefore subjoined. If a witness be asked whether goods were paid for on a certain day, and he answer in the affirmative, if the goods were really paid for, though not on that day, it will not be perjury under the English law, 2 *Rol. Rep.* 41, 42, unless the day be material. So if a man swear that J S beat another with a sword, and it turn out that he beat him with a stick, this is not perjury, for all that was material was the battery; *Hetley*, 97; see 1 *Hawk*, *c.* 69, *s.* 8. So every question in cross-examination which goes to the witness's credit (as whether he has before been convicted of felony; *Reg.* v. *Lavey*, 3 *C. and K.* 26) is material for this purpose; *Reg.* v. *Overton*, 2 *Wood, C. C.* 263. So where an *alibi* is being proved, it may be material to inquire where the witness was sleeping on a certain nights, with a view to shew, in contradiction to his testimony, that he was in prison at the time he said he was at home; *Reg.* v. *Tyson, Central Criminal Court, 13th June* 1867. Evidence of the payment of money by the putative father of a bastard child within twelve months before the issuing of an affiliation summons against him on the hearing of the summons is material; *Reg.* v. *Berry*, 1 *Bell, C. C.* 46. The question of materiality may sometimes be for the jury, or the court as a jury; as where the assignment of perjury, alleged to have been committed on the hearing of an affiliation summons against the defendant was in his swearing "that he had never kissed" the prosecutrix; *Reg.* v. *Goddard*, 2 *F. and F.* 361. Where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor as to whether he had not the day before that of the alleged robbery met him (the prisoner) in company with M, and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M to prove it; it was held that M's evidence was not material to the issue; *Reg.* v. *Murray*, 1 *F. and F.* 80.

It next is necessary to consider what must be proved in respect to the falsity of the alleged evidence, and the knowledge and belief of the accused in respect thereof. In the case of *Reg.* v. *Ahmed Ally*, 11 *W. R. Cr.* 27, *Norman*, J., in delivering judg-

ment says:—"It appears to us that the true rule is that no man can be convicted of giving false evidence *except upon proof of facts which, if accepted as true,* shew not merely that it is incredible, but *that it is impossible that the statement of the party accused made upon oath can be true.* If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because, assuming all that is proved to be true, it is still *possible* that no crime was committed." But as legitimate evidence for that purpose, the law makes no distinction between the testimony of a witness directly falsifying the statement of the accused and the contradictory statement of the person charged, although not upon oath. Such a statement, when satisfactorily proved, is as good evidence in proof of the charge as the criminatory statement of a person charged with the commission of any other offence, and on precisely the same ground; that it is an admission inconsistent with his innocence; *Reg.* v. *Ross,* 6 *Mad. H. C. Rep.* 342; see also *Reg.* v. *Hook,* 27 *L. J. N. S. M. C.* 222. Beyond this the Penal Code requires the prosecution to prove that the accused knew or believed that the statement he made was false at the time of making it, or that he did not believe it to be true. In this last requirement the Penal Code goes beyond the English law, inasmuch as it imposes upon a witness the necessity of forming a definite belief as to the truth of his evidence before he gives it, and prevents him from sheltering himself under the plea of carelessness or inadvertence. A man, before he gets into the witness-box, must *believe* that all the evidence he his about to give is true, otherwise he gives false evidence. That this is an extension of the English law will be seen from the statement in Archbold as to what is perjury under that law: "The matter sworn must be either false in fact, or if true, the defendant must not have known it to be so; 1 *Hawk, c.* 69, *s.* 6; 3 *Inst.* 166; *Palmer,* 294. As, for instance, if a man swear that J N revoked his will in his presence, if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury; *Hetley,* 97." The state of the prisoner's mind at the time he gave the alleged false evidence, of course, cannot be proved directly; but surrounding circumstances will ordinarily furnish sufficient facts, from which it can be be inferred that he

knew or believed his evidence to be false, or did not believe it to be true.

If the defendant has always adhered to one statement, some one or more of the charges of false evidence must be proved by two witnesses: one witness alone is not sufficient, because in that case there is only oath against oath; and the presumption of law being in favour of the innocence of the prisoner, he must be acquitted; *R.* v. *Muscot*, 10 *Mod.* 194. But if the charge of giving false evidence be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this, it seems, would be sufficient; *R.* v. *Lee*, 2 *Russ.* 650; see also *Reg.* v. *Boulter*, 2 *Den. C. C.* 396. But in England the mere contradiction of one oath of the defendant by another is not enough; *Reg.* v. *Harris*, 5 *B. and Ald.* 296; *Reg.* v. *Wheatland*, 8 *C. and P.* 238. In this latter case, upon an indictment for perjury in giving evidence before the Quarter Sessions, the prosecutor produced the examination of the defendant before the magistrate, in which he deposed in the direct negative to everything he had sworn before the court; but *Gurney*, B., held this was not sufficient *per se*, without other evidence to shew that the statement before the court was false and that before the magistrate true.

In India, however, under some circumstances, a defendant who has made two contradictory statements, one of which must be false, can be convicted of giving false evidence under Sect. 193 of the Penal Code without the court or jury finding by direct evidence *which* of such statements is false; for though Sect. 236 of the Criminal Procedure Code does not provide for an alternative finding where the conviction is for one of two offences under the *same* part of the the *same* section, and where it is not decided which of the two said offences it is that the accused is guilty of, yet Schedule V. provides for a charge of giving false evidence being framed in the alternative, and this alternative charge would be useless if the court or jury were bound to state which particular statement was false. There have been contradictory decisions as to this. In Calcutta the matter is now set at rest by a full bench ruling in the case of *Reg.* v. *Mahomed Humayoon Shah*, 21 *W. R. Cr.* 72. In this case it was decided that when a charge is framed

containing two contradictory statements of such a nature that the specific offence of intentionally giving false evidence is disclosed by the two taken together, it must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them, intentionally spoke falsely in regard to one of them; and this evidence it is for the jury or court to decide on. See, also, *Reg.* v. *Mussamut Zumeerun*, 6 *W. R. Cr.* 65; and *Habibulla* v. *Emp. I. L. R.* 10 *Calc.* 937, in which the two preceding cases were discussed and acted on. In Madras it has been held, following the case of *Reg.* v. *Mussamut Zumeerun*, that proof of contradictory statements on oath or solemn affirmation without evidence as to which is false is sufficient to justify a conviction for giving false evidence; *In re Palany Chetty*, 4 *Mad. H. C. Rep.* 51. In Bombay the only case reported is that of *Reg.* v. *Ganoji Pandjee*, 5 *Bom. H. C. Rep. C. C.* 49, in which it was decided that where a person makes two contradictory statements in the course of a judicial proceeding, he may be tried and convicted of giving false evidence on a single alternative charge, if there is evidence to shew which statement is false. At Allahabad, it was for sometime held that the fact that an accused has made one statement on oath at one time, and a directly contradictory one, also on oath, at another, is not sufficient to warrant a conviction for giving false evidence, but that the charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence to establish the falsity of that which is impeached as untrue; *Emp.* v. *Niaz Ali*, *I. L. R.* 5 *All.* 17; subsequently, however, in the case of *Emp.* v. *Ghulet*, *I. L. R.* 7 *All.* 44, the case just referred to was overruled and the practice of the court assimilated to that of the High Court in Calcutta, as set forth in the cases before referred to.

In order to obtain a conviction on an alternative charge in respect of contradictory statements, both the statements must have been on oath; or else they must have been made under circumstances in which the law requires a person to speak the truth, or one under these circumstances, and one on oath; *Emp.* v. *Baikanta*, *I. L. R.* 16 *Calc.* 349. Where the accused made a statement to a public servant which might possibly have amounted to an offence under Sect. 182, and subsequently before a magistrate gave evidence

which was supposed to be contradictory to his former statement; it was held that, even supposing such contradiction existed, he could not be convicted under Sect. 193 on an alternative charge; *Emp.* v. *Ramji Sajavarav*, *I. L. R.* 10 *Bom.* 124; nor could he be convicted on a charge in which he was charged with having committed an offence, either under Sect. 182 or else under Sect. 193; *ib.*

Where a prisoner is charged separately with having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one does not involve an acquittal on the other; *Reg.* v. *Hossain Ali*, 8 *B. L. R. App.* 25.

Falsely deposing in the name of another person is giving false evidence, not cheating by personation; *Reg.* v. *Prema Bhicka*, 1 *Bom. H. C. Rep.* 89.

The making of a false return on oath of the service of a summons is an offence under Sect. 193, and not Sect. 181, being evidence given in a judicial proceeding; *Reg.* v. *Shama Churn Roy*, 8 *W. R. Cr.* 27; the giving of false evidence otherwise than in a judicial proceeding is punishable under the latter clause of Section 193, provided it has been given under the sanction of the law; *In re Andheen Roy*, 14 *W. R. Cr.* 24.

On a trial for murder, a witness had stated on oath that a person other than the prisoner had committed it; whilst before the magistrate he had stated, as was the fact, that the prisoner was the guilty party. In making such statement on the trial, the witness was guilty of an offence under Sect. 193, and not under Sect. 194, as he did not know that he would, nor did he intend to, cause a conviction for murder; *Reg.* v. *Hardyal*, 3 *Ben. L. R. A. Cr. J.* 35.

Sect. 191 includes all cases in which a party is expressly bound to make a statement, and a true statement, but it does not apply to merely voluntary statements, such as form the basis of a contract, nor to false statements in a complaint to the police; 2 *R. J. and P.* 25. It is not necessary, however, that these statements be made in a court of justice to come under the section as false evidence.

The practice in the High Courts is to set out the substance, and as nearly as possible the very words of the statement, which is charged as false. Where the charge did not distinctly set forth

the statement which was alleged to be false, but it appeared that the prisoners perfectly understood on their trial what was the alleged false statement, and had not been prejudiced on the trial in their defence by the defective form of the charge, the court refused to interfere; 4 *R. J. and P.* 359; *Reg.* v. *Boodhun Ahir*, 17 *W. R. Cr.* 32. But the High Court of Calcutta has directed that in all committals under Sects. 193-195, the particular statements on which perjury is assigned should be invariably inserted in the charge; 1 *R. C. C. Circ.* 15, 16. It has since been ruled that charges of giving false evidence should contain a distinct assertion with regard to *each* statement intended to be characterised as false; that it was made; that it is untrue in fact; and that the accused knew it was so when he made it; *Reg.* v. *Kalichurn Lahoree*, 9 *W. R. Cr.* 54; see also *In re Dowlut Moonshee*, 8 *W. R. Cr.* 95; *Reg.* v. *Feojdar Roy*, 9 *W. R. Cr.* 14; and *Reg.* v. *Boodhun Ahir*, 17 *W. R. Cr.* 32. Where six prisoners were charged in the same charge as follows: "That you on or about the day of June, , at Tajpur, committed the offence of voluntarily giving false evidence in a stage of a judicial proceeding and that you have thereby," &c.; it was held that the charge was bad and defective,—*firstly*, as it charged a number of persons jointly with giving false evidence; *secondly*, as it did not shew what statements the accused persons made; *thirdly*, as it did not mention the day and year when the alleged offence was committed; *fourthly*, because it did not indicate the court or officer before whom the false evidence was given; *Reg.* v. *Maharaj Misser*, 7 *Ben. L. R. App.* 66, and 16 *W. R. Cr.* 47. In the case of *Reg.* v. *Kureem*, 11 *W. R. Cr.* 42, it was also held that the commitment and trial together of several persons who are charged with having given false evidence in the same proceeding should not be allowed, and that although prisoners may be committed together, the Court of Session has power to try them separately, and under the above circumstances should do so. Each act of giving false evidence by different persons, although in the course of the same judicial proceeding, is a separate offence, and a separate charge must necessarily be framed against each prisoner, and a separate trial must be held of each charge; 2 *Mad. Jur.* 290; *Reg.* v. *Khoab Lall*, 9 *W. R. Cr.* 66; *Reg.* v. *Bhavanishankar*

Haribhai, 5 *Bom. H. C. Rep. C. C.* 55. But the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and charges of false evidence cannot be multiplied according to the number of false statements. These are merely evidences of the offence; and testing the matter by the law of evidence, it is manifest that the whole deposition must be looked at, and, if necessary, one part qualified by the other; 6 *Mad. H. C. Rep. App.* 27.

The making of a false oath or signing a false notice or certificate to procure a marriage is punishable under Sect. 193; *Act* XV. *of* 1872, *Sect.* 66.

Sections 194 *and* 195.—To render a person liable under these two sections, as distinguished from Sect. 193, the evidence must have been given or fabricated in the final stage, *i.e.*, the trial, and not in the preliminary enquiry into the case. The natural result of false evidence given before the magistrate holding the preliminary enquiry would be nothing graver than a committal of the accused persons to the Court of Session, and not necessarily a conviction, and it must be presumed that the accused intended the natural, that is, the ordinary consequence; *Reg.* v. *Gopaldas Bhagwandas*, *B. R.* 22*nd January* 1874; but in *Reg.* v. *Nim Chand*, 20 *W. R.* at p. 43, it had previously been ruled that, under Sect. 194, the evidence need not have been given before a Court of Justice, provided that the court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case. Where on the trial of a prisoner for murder, a witness stated before the Sessions Court, that another had committed the murder, whilst before the magistrate he had stated, as was the fact, that the prisoner had committed it; it was held that he was not guilty under Sect. 194; *Reg.* v. *Harydyal*, 3 *B. L. R. Ap. Cr.* 35.

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Fabricating False Evidence.—In a charge of fabricating false evidence, it is essential to prove that it was intended by the accused that the false circumstance should appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, that

is, should appear as part of the legal evidence upon which the officer has to form his judgment; *Reg.* v. *Rajcoomar*, 1 *Ind. Jur. O. S.* 105; consequently, the making up falsely of accounts with the intention of producing them before a forest officer not empowered by law to hold an investigation and take evidence is not a fabrication of false evidence within Sect. 193; *Reg.* v. *Ramajirav*, 12 *Bom. H. C. Rep.* 1; but the making of a false entry, by a public servant, for the purpose of saving an estate from forfeiture of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, or as to what estates were in arrears in their rents, so that the Collector might take steps to enforce payment, is a fabrication of false evidence; *In re Juggun Lall*, 7 *C. L. R.* 356. If a public servant, in charge of certain documents, having been required to produce them, and being unable to do so, fabricates and produces similar documents with the intention set forth in Sect. 192, he will be guilty of an offence under Sect. 193; *Emp.* v. *Mazhar Husain*, *I. L. R.* 5 *All.* 553. Altering the date of a document, so as to enable it to be registered is fabricating false evidence; *In re Mir Ikrar Ali*, *I. L. R.* 6 *Calc.* 482; so, too, where the accused fabricated a letter in order to support a claim before a registrar to have a document registered; *Lakshmaji* v. *Emp. I. L. R.* 7 *Mad.* 289. M instigated Z to personate C, and, in C's name, purchase a certain stamped paper, in consequence of which the stamp vendor endorsed C's name on the paper as the purchaser thereof. M intended that such endorsement should be used against C in a judicial proceeding; it was held that the offence of fabricating false evidence had actually been committed, and that M was guilty of the abetment of such offence; *Emp.* v. *Mula*, *I. L. R.* 2 *All.* 105. A police officer who makes a false entry in his diary to support his assertion that he had forwarded certain documents, is not guilty of fabricating false evidence, as such entry could not be used as evidence of that fact in a judicial proceeding; *Emp.* v. *Gauri Shankar*, *I. L. R.* 6 *All.* 42.

Where a man burns his own house, and charges another with the act, he commits an offence under Sect. 211, and not under Sect. 195; *Reg.* v. *Bhugwan*, 8 *W. R. Cr.* 65. Where prisoners

assist in concealing stolen property in a person's house and field in order that, being found there on a search, it may afford evidence against that person on a charge of theft, it was held that they were guilty of fabricating false evidence; *Emp.* v. *Rameshar*, *I. L. R.* 1 *All.* 379.

It must further be shewn that the circumstance was of such a nature as might cause the officer before whom it was to be given in evidence to entertain an erroneous opinion touching some material point on the case; consequently, the *materiality* of the fabricated evidence must be shewn; *Reg.* v. *Damodhur Ramchundra*, 5 *Bom. H. C. Rep. C. C.* 68. Therefore, it was held that a vakeel who presented a *vakalatnamah*, which falsely purported to have been signed before the *Adighari* of a village and to bear the signature of the *Adighari*, was not guilty of fabricating false evidence; *In re Keilasuni Putter*, 5 *Mad. H. C. Rep.* 373.

Using False Evidence.—This section does not apply to subornation of perjury, but to cases where false evidence has been used after it was in existence; *Reg.* v. *Suffurudeen*, 1 *Ind. Jur. O. S.* 122. L brought a suit upon a bond, and at the trial sought to support his claim by a letter fabricated for the purpose of enabling L to get the bond registered; it was held that, even if the letter was fabricated only for use before the registrar, that was no valid objection to a conviction under this section; *Lakshmaji* v. *Emp.* *I. L. R.* 7 *Mad.* 289; see also *Reg.* v. *Oodun Lall*, 3 *W. R. Cr.* 17. These two cases were tried before a Session Court, and no question therefore, was raised as to the jurisdiction of the tribunal; but where a similar case was tried before a magistrate, it was held that the offence fell under Sect. 471, and not under Sect. 196, and, consequently, that the magistrate had no jurisdiction to try the case; *Emp.* v. *Kherode Chunder Mozumdar*, *I. L. R.* 5 *Calc.* 717.

As Sect. 196 does not specify in so many words the amount of punishment, the charge should contain the words "punishable under Sects. 193 and 196 of the Indian Penal Code"; 2 *W. R. Cr. L.* 9.

Sections 197, 198, 199, 200.—Under these sections the *materiality* of the false statement must be shewn in addition to the other requirements of the sections.

The word "declaration" in Sect. 199 means any statement of fact in the form simply of a declaration, which, for the purpose of

proof of the fact declared, has by itself all the force of evidence given on oath, or solemn affirmation substituted for an oath; in short, a declaration receivable in lieu of personal *vivâ voce* testimony; *Reg.* v. *Vedamootoo*, 4 *Mad. H. C. Rep.* 185, and 4 *Mad. Jur.* 72. There is no express provision of law which requires a court to receive a "verified application," *e.g.*, an application for execution, as "evidence of any fact"; consequently a person making a false statement in such an application cannot be convicted under Sect. 199, but it does not prevent his conviction under Sect. 193; *Emp.* v. *Bapuji Dayaram*, *I. L. R.* 10 *Bom.* 288.

Making, signing or attesting any false declaration or certificate of marriage is punishable under Sect. 199; *Act* III. *of* 1872, *Sect.* 21.

Sanction.—A civil court sanctioning a criminal prosecution for giving false evidence must distinctly state the exact words upon which the prosecution is to be based, and must not give such a sanction in general terms; *Reg.* v. *Kartik Chunder Halder*, 5 *R. C. C. Cr.* 58, and 9 *W. R. Cr.* 58. A sanction, however, is sufficient if it be to prosecute in respect of any false statement contained in two specified depositions; *Reg.* v. *Kadir Bux*, 11 *W. R. Cr.* 17. To a prosecution by a sub-registrar for an offence committed before him, the specific sanction of the registrar is required; *Reg.* v. *Kalichurn Lahoree*, 5 *R. C. C. Cr.* 41.

Preliminary Enquiry.—At the preliminary enquiry, to ascertain whether the accused shall be committed to take his trial for giving false evidence, he must be present as an accused person, and have an opportunity of cross-examining the witnesses, and not merely be present as one of a number who give evidence on oath in respect to a certain subject-matter; *Reg.* v. *Kalichurn Lahoree*, 9 *W. R. Cr.* 54.

Abetment of False Evidence, &c.—There can be no abetment of false evidence unless the accused, not only desires or instigates the giving of certain evidence, but also knows or believes that that evidence is false; *Reg.* v. *Nim Chand*, 20 *W. R. Cr.* p. 44.

Where C falsely represented himself as U the writer of a document signed by U; and T, knowing that C was not U, and had not written such document, produced C as U and as the writer of the document, it was held that T ought to be convicted on a

charge of abetting the giving of false evidence; *Reg.* v. *Chundi Churn*, 8 *W. R. Cr.* 5. A suppression of evidence is a giving of false evidence. A prisoner asked a witness to suppress certain facts in giving his evidence against him before a magistrate on a charge of defamation. It was held that this amounted to an abetment of the offence of giving false evidence in a stage of a judicial proceeding; *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438.

DESTRUCTION OF EVIDENCE.

Sect. 201. *Causing Evidence to disappear, &c.*—**Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.**

Illustration.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years and also to fine.

Triable by the Court of Session if the offence intended to be screened is capital; by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class, if such offence be punishable with transportation or imprisonment for ten years; and in the case of the offence to be screened being punishable with less than ten years' imprisonment, by a Presidency Magistrate, or a Magistrate of the first class or the Court by which the original offence is triable. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , knowing that a capital offence had been committed, to wit, that one C D had committed murder by causing the death of one E F, did, with the intention of screening the offender, to wit, the said C D, from legal punishment, cause certain evidence of the said offence to disappear, to wit, by removing the dead body of the said E F from the place where the murder was committed, and burying it secretly in the field of one G H, and that you, the said A B, have thereby committed an offence punishable under Sect. 201 of the Indian Penal Code, and within, &c.

Evidence.

This section refers, not to the principal offender, but to persons other than the actual criminals, who, by their causing evidence to disappear, assist the principal to escape the consequences of his offence. In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law where the thing punishable under such special or local law is punishable with imprisoment for six months or upwards, whether with or without fine; *Sect.* 40.

A prisoner pushed a woman, she fell into a boat, and died then and there. Afterwards the prisoner set the boat with the corpse in it afloat down the river, and so concealed the evidence of his offence. It was held that he was not guilty of the offence of causing evidence to disappear; *Reg.* v. *Ramsoonder Shootar*, 7 *W. R. Cr.* 52; 1 *R. C. C. Circ.* 19; 2 *Mad. Jur.* 282. See, also, *Emp.* v. *Behala Bibi*, *I. L. R.* 6 *Calc.* 789; *Reg.* v. *Kasinath Dinkar*, 8 *Bom. H. C. Rep. C. C.* 126; and *Emp.* v. *Lalli*, *I. L. R.* 7 *All.* 749; *Emp.* v. *Dungar*,